

Undoing Our Selves: The Error of Sacrificing Speech in the Quest for Equality

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[M]y language is the sum total of myself

Charles S. Peirce¹

If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark:

"Another such victory and I am undone."

Justice Hugo Black²

I. INTRODUCTION

Ronald Dworkin and Richard Posner, in their separate though virtually simultaneous reviews of Catharine MacKinnon's recent book, *Only Words*,³ each expressed both serious doubt and some surprise over one of the book's central arguments, the idea that the Equal Protection Clause of the Fourteenth Amendment demands the suppression of any speech that endangers the goal of social equality.⁴ Thus, readers of the popular press during one week in October 1993 might have come away from these two reviews under the impression that MacKinnon was spearheading a revolution in constitutional thought.⁵ The

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¹ Charles S. Peirce, *Some Consequences of Four Incapacities*, J. SPECULATIVE PHIL. (1868), reprinted in 1 CHARLES S. PEIRCE, THE ESSENTIAL PEIRCE 28, 54 (Nathan Houser & Christian Kloesel eds., 1992).

² *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (Black, J., dissenting).

³ CATHARINE A. MACKINNON, ONLY WORDS (1993).

⁴ Ronald Dworkin, *Women and Pornography*, N.Y. REV. OF BOOKS, Oct. 21, 1993, at 36, 40 (reviewing MACKINNON, *supra* note 3); Richard A. Posner, *Obsession*, NEW REPUBLIC, Oct. 18, 1993, at 31, 32 (same).

⁵ Dworkin particularly gives this impression, calling MacKinnon's equality argument both "striking" and "new." Dworkin, *supra* note 4, at 36, 40. And, truth be told, MacKinnon does little to discourage such a notion. See MACKINNON, *supra* note 3, at 83 ("No one to my knowledge has proposed that Congress prohibit hate propaganda to effectuate the Fourteenth Amendment.").

Curiously, this very point became a subject of contention between the two when MacKinnon wrote a letter responding to Dworkin's review of her book and Dworkin, in turn, replied to the letter. See *Pornography: An Exchange*, N.Y. REV. OF BOOKS, Mar. 3,

perception of a clash between free speech and one or another conception of equality, however, is not novel in the legal literature.⁶ Yet it is true that while calls for restricting certain kinds of speech in the service of equality have been sounding for some years, the voices of these equalitarian critics, as I will refer to them, have become both more numerous and more insistent of late. They include commentators who, like MacKinnon, deplore the absence of regulations on pornography and "hate speech" directed at women and minorities,⁷ as well as those, such as Cass Sunstein, who also favor subjecting broadcasting and campaign financing to regulations aimed at producing something approaching equal participation in politics.⁸

1994, at 47. MacKinnon, apparently not adverting to her own statement quoted in the parenthetical of the preceding paragraph, upbraids Dworkin for calling "the equality argument" new. *Id.* (MacKinnon's letter to the editors). Dworkin, for his part, readily admits that there is nothing new about the general argument that "every harm pornography does is a harm of inequality." *Id.* at 48 (Dworkin's reply to MacKinnon's letter). He says that he meant only that the "much more specific constitutional thesis" regarding the Equal Protection Clause was new. *Id.* But see sources cited *infra* note 7.

⁶ For early examples of such concerns in the area of hate speech, see Loren P. Beth, *Group Libel and Free Speech*, 39 MINN. L. REV. 167 (1955); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982), reprinted in MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 89, 90 (1993).

⁷ See, e.g., Charles R. Lawrence III et al., *Introduction*, in MATSUDA ET AL., *supra* note 6, at 1, 15 [hereinafter Lawrence, *Introduction*] ("The [F]irst [A]mendment is employed to trump or nullify the only substantive meaning of the [E]qual [P]rotection [C]ause, that the Constitution mandates the disestablishment of the ideology of racism."); Mary Ellen Gale, *Reimagining the First Amendment: Racist Speech and Equal Liberty*, 65 ST. JOHN'S L. REV. 119, 154-64 (1991); *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFF. L. REV. 337, 360 (1989) (remarks of Mari J. Matsuda) ("[T]he right of speech is meaningless to people who do not have equality."); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, reprinted in MATSUDA ET AL., *supra* note 6, at 53, 77 [hereinafter Lawrence, *If He Hollers*] ("[W]e see equality as a precondition of free speech . . ."); Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211, 265 (1991) ("[T]he liberal's high regard for free expression presupposes several conditions that remain unmet.").

⁸ See, e.g., CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 81-88, 94-101 (1993). Sunstein also discusses the demands of equality vis-à-vis hate speech, *id.* at 193-208, and pornography, *id.* at 219-20.

Although the arguments from equality for circumscribing the reach of the First Amendment arise in a number of contexts, it would be impossible to consider all of them in any detail here. It will be useful, then, to take as a model the case based on concerns of racial and gender equality. These arguments have been aired thoroughly, see, e.g., sources cited *supra* notes 6-7, and so have been developed fully enough to include within them

Most of these critics see the gains to be made in social equality as coming at the expense of the right of free speech, at least as it has been conceptualized in the modern tradition.⁹ While restrictions on directly coercive or intimidating speech raise few problems under any theory of the First Amendment, these critics include in their attacks speech that they believe frustrates the goal of social equality because of its power to persuade. On this view, the First Amendment must, in certain circumstances, give way under a balancing test—or even be categorically subordinated—to the Fourteenth.¹⁰ Such arguments have already provoked a number of responses from opponents who regard the equalitarians' proposed balancing tests and revisionism as improper and logically unfounded.¹¹ Yet even among most supporters of undiluted speech rights, there persists the image of the Free Speech and Equal Protection Clauses¹² as potentially competing interests.¹³ In the rare instances in which

many of the lines of reasoning found in the equality claims fashioned in other settings. (For an extensive "representative sample" of the hate speech literature, see the list of articles compiled in Calvin R. Massey, *Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression*, 40 UCLA L. REV. 103, 105–06 n.3 (1992)). This is not to say that all equalitarian advocates—even those emphasizing gender and racial interests—agree on every point of a single program for revising speech rights; nonetheless, their ideas possess sufficient commonalities to make possible a broad outline of their shared enterprise.

⁹ See, e.g., MACKINNON, *supra* note 3, at 85 ("[T]here never has been a fair fight in the United States between equality and speech as two constitutional values . . ."); SUNSTEIN, *supra* note 8, at 193 ("When speech helps contribute to the creation of a caste system, the state can legitimately and neutrally attempt to respond . . ."); Lawrence, *If He Hollers*, *supra* note 7, at 434 ("At the center of the controversy is a tension between the constitutional values of free speech and equality."); see also sources cited *supra* note 7.

¹⁰ MACKINNON, *supra* note 3, at 71 (suggesting that the Civil War Amendments "perhaps even demand reconstruction of the speech right itself"); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 306–08 (1989).

¹¹ See, e.g., Anthony D'Amato, *Harmful Speech and the Culture of Indeterminacy*, 32 WM. & MARY L. REV. 329, 332 (1991); Terry Heinrichs, *The Civil Libertarian as Censor: "Public Response" Reconsidered*, 56 ALB. L. REV. 337, 340 (1992); Peter Linzer, *A White Liberal Looks at Racist Speech*, 65 ST. JOHN'S L. REV. 119 (1991); Massey, *supra* note 8; Bert Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community, and Hate Speech*, 27 HARV. C.R.-C.L. L. REV. 339 (1992); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484.

¹² Respectively, they read as follows:

Congress shall make no law . . . abridging the freedom of speech

U.S. CONST. amend. I.

commentators have attempted to reconcile the two constitutional provisions as part of their defense of free speech, they have properly relied on an alternative vision of equality: the concept of self-rule, of which the First Amendment is an important element and which dictates that citizens must be equally free to participate in their own governance.¹⁴ But even these critics do not sufficiently explain the relationship between the two visions of equality or, indeed, why proponents of social equality should be willing to abandon their position in favor of the type of equality that some have suggested is embodied in the right of free speech.

For these reasons, stating a coherent theory of equality that comprehends the significance of speech calls for a limning of the most basic foundations of the right of free speech. The ultimate inquiry will be this: Does the speech right protect precisely the same human characteristics that underlie the goals of social equality? If so, then suppressing speech as a means of achieving social equality is a logical impossibility. In other words, if it can be demonstrated that, absent the human qualities that depend upon speech, social equality would

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Id. amend. XIV, § 1.

¹³ The most sustained consideration of the presumed conflict between speech and equality appears in recent works by Robert Post. *See, e.g.*, Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in 35 [DEMOCRATIC COMMUNITY] NOMOS 163 (John W. Chapman & Ian Shapiro eds., 1993) [hereinafter Post, *Between Democracy and Community*]; Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 603 (1990) [hereinafter Post, *Constitutional Concept*]; Robert C. Post, *Free Speech and Religious, Racial, and Sexual Harassment: Racist Speech, Democracy and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991) [hereinafter Post, *Free Speech*]; Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993) [hereinafter Post, *Meiklejohn's Mistake*]. While Post is, to say the least, ambivalent about the amenability of the conflict to satisfactory resolution, he generally opposes the subordination of speech rights to demands for social equality. *See, e.g.*, Post, *Free Speech, supra*, at 314–17.

¹⁴ *See, e.g.*, Post, *Free Speech, supra* note 13, at 292–93 (arguing that elevating the Fourteenth Amendment over the First requires some source of governing authority, an “Interpreter” other than “the people” and that “[t]he impossibility of locating such an Interpreter suggests the difficulties that attend the argument from the [F]ourteenth [A]mendment”). Ronald Dworkin has been the most explicit in suggesting that speech rights can be defended as embracing a kind of equality right. *See* Dworkin, *supra* note 4, at 42 (“First Amendment liberty is not equality’s enemy, but the other side of equality’s coin.”); *see also* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975) (arguing for equal liberty of expression).

be left without any logical basis to recommend it, then the Equal Protection Clause cannot be understood to dominate—or even to clash with—free speech protection. This Article seeks to establish such an inextricable linkage.

Part II traces the nature of speech to its deepest functional roots and finds that, understood as the capacity for and exercise of conceptual thought, it emerges as the single important feature responsible for making human beings human. Drawing on the ideas of the pragmatist philosopher Charles Peirce, particularly as developed by Walker Percy, this Part examines the significance of the triadic nature of speech. Speech creates an irreducible relationship among three elements—a thing (object), a word (sign), and a person who understands the word as standing for the thing (interpretant).¹⁵ By virtue of this relationship, speech stands in a unique position when contrasted with all other phenomena in the universe, which involve, in however complex a combination, only the “dyadic relations” of two things interacting with one another.¹⁶ This uniqueness matters because it is the triadic event of speech that makes possible not only the exchange of meaning with others, but also the consciousness of meaning within one’s own self.¹⁷ In a word, speech is the source of—or rather, the very content of—the human self, and freedom of speech is the key to self-realization, the flourishing of the self. As such, it is the single animating force behind each of the myriad of values, such as autonomy, dignity of the individual, moral agency, and the like, that have been suggested as the bases for fundamental rights.¹⁸ Through speech, the self creates itself by inquiring into and coming to a knowledge of the nature of the reality of the external world and deciding how best to live in that world.

¹⁵ The terminology will be recognized as one of a number of variations coming out of semiotics, the science of signs. See WALKER PERCY, *LOST IN THE COSMOS* 86–88 n.* (1983).

¹⁶ From the beginning and for most of the fifteen billion years of the life of the Cosmos, there was only one kind of event. It was particles hitting particles, chemical reactions, energy exchanges, gravity attractions between masses, field forces, and so on. . . . Even a system as inconceivably vast as the Cosmos itself can be understood as such an interaction Every element in the Cosmos is in interaction with every other element.

PERCY, *supra* note 15, at 85–87; see also WALKER PERCY, *THE MESSAGE IN THE BOTTLE* 161–62 (1975) [hereinafter PERCY, *MESSAGE IN THE BOTTLE*] (laying out Peirce’s original conception).

¹⁷ See VINCENT M. COLAPIETRO, *PEIRCE’S APPROACH TO THE SELF* 37–38, 90–91 (1989).

¹⁸ See *id.* at 67–68 (stating that “Peirce’s notion of the self provides a basis for autonomy—in particular, for the level of self-control that distinguishes the human animal from other animals”).

Part III makes the crucial connection between rights of social equality and speech as the preeminent fundamental right. Notwithstanding the suggestions of some scholars to the contrary,¹⁹ fundamental rights, particularly the speech right, can profitably be understood as the wellhead of the normative value of social equality.²⁰ The statement that social equality *ought to* exist among all people necessarily entails the proposition that all people *are in fact* alike in the particular respect that, according to an independent prescriptive standard, determines the social treatment that each individual should receive.²¹ Social equalitarians make a prescriptive judgment, uncontestable in view of the Fourteenth Amendment, that government must treat all persons as equals. Argument may well ensue over what the principle of equal treatment demands (a "color blind" Constitution versus affirmative action, for example), but the salient issue here arises prior to such disputes and it cannot be understood by simple reference to the Equal Protection Clause.

The basis of descriptive equality that underlies and so legitimizes the prescriptive case for social equality is nothing other than the fact that all persons possess a human self, the self being constituted by the speech capacity, which all human beings have in equal measure.²² The speech right itself thus protects the logical basis of the aspiration to social equality.²³ However one comes out on issues of the proper reach of the Equal Protection Clause, this fact serves to rule out one means of achieving the Clause's goals. To anyone but a First Amendment absolutist, restrictions on speech will sometimes be justified by other rationales in certain circumstances; however, the decision to outlaw speech as a method of attaining social equality weakens the very structure upon which the prescription for social equality itself stands. To argue

¹⁹ See, e.g., PETER WESTEN, *SPEAKING OF EQUALITY* 122-27 (1990); James W. Nickel, *Dworkin on the Nature and Consequences of Rights*, 11 GA. L. REV. 1115, 1129 (1977).

²⁰ In addition to the sources cited *supra* note 14, see Gregory Vlastos, *Justice and Equality* (1962), reprinted in *THEORIES OF RIGHTS* 41, 51-67 (Jeremy Waldron ed., 1984); Jeremy Waldron, *Jurisprudence and Political Theory: The Substance of Equality*, 89 MICH. L. REV. 1350, 1358-62 (1991) (reviewing WESTEN, *supra* note 19).

²¹ See WESTEN, *supra* note 19, at 86-87, 122-23; Waldron, *supra* note 20, at 1353-55; *infra* notes 133-34 and accompanying text.

²² The equal capacity for speech is not to be confused with equal facility or talent in making use of the speech capacity. See *infra* notes 166-68 and accompanying text.

²³ Cf. Ronald Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113, 125-26 (Stuart Hampshire ed., 1978) (arguing that equal distribution of resources is a derivative principle subject to limitation by the constitutive principle of treatment of all people with equal concern and respect); see also Stanley I. Benn, *Egalitarianism and the Equal Consideration of Interests*, in 9 [EQUALITY] *NOMOS* 61, 67-68 (J. Roland Pennock & John W. Chapman eds., 1967); Waldron, *supra* note 20, at 1362.

otherwise is to advocate breaking up the cornerstone to provide material for an additional story on the edifice of equality.

Part IV takes up an objection that social equalitarians might make to the conclusions of Parts II and III. The equalitarians might grant that the self truly is the ultimate justification for their advocacy of social equality; but, they could maintain, an accurate understanding of the self would recognize that exposure to particular species of speech erodes the self, weakening its ability to achieve realization.²⁴ Defenders of the speech right in this context have turned most often to democratic theory to suggest that the political equality of persons in the marketplace of speech, the adjunct of the voting booth, forbids censorship on these grounds.²⁵ The equalitarians, however, refuse to accept a vision of democracy that would, in the name of democracy, allow the social subordination of women and minorities, though it may result only from the ideas contained in speech. Some have thus indicated their belief that the command of the Fourteenth Amendment functions to limit these basic democratic principles where social equality is at stake.²⁶ But the idea of suspending the operation of democracy as it is manifested in the freedom of speech raises a fundamental problem. No principled basis exists upon which to limit the suspension to one issue such as social equality, however important or narrowly drawn. Were it to be accepted that democracy via speech is only a contingent requirement of our form of government, dispensable in areas of overriding concern, the delineation of those areas in which free speech is intolerable would, by default, be left to whomever was in power. There are simply no logical intermediate steps between the well-intentioned position of the social equalitarians and a descent into total authoritarianism.

Yet the usefulness of democratic theory in this context is not limited to exposing the fatal weakness of the equalitarian argument. The conception of speech as the key to the worth of the individual, developed in Parts II and III, can illuminate the positive substantive content of the often-expressed idea of speech as a right of political equality.²⁷ While speech undeniably serves an

²⁴ Too often victims of hate speech find themselves without the words to articulate what they see, feel, and know. In the absence of theory and analysis that give them a diagnosis and a name for the injury they have suffered, they internalize the injury done them and are rendered silent in the face of continuing injury.

Lawrence, *Introduction*, *supra* note 7, at 13.

²⁵ See *supra* note 14 and accompanying text.

²⁶ See Lawrence, *Introduction*, *supra* note 7, at 15; MACKINNON, *supra* note 3, at 72.

²⁷ See, e.g., Dworkin, *supra* note 4, at 41 ("[T]he First Amendment's egalitarian role . . . forbids censoring cranks or neo-Nazis . . . because equality demands that everyone, no matter how eccentric or despicable, have a chance to influence policies as well

instrumental purpose for the operation of democracy, this is not the essence of the relationship. Indeed, the true causal dynamic runs in precisely the opposite direction: properly understood, free speech is not justified (or not *primarily* justified) by the choice of democracy as a system, but rather the choice of democracy is justified by the valuable properties of speech. As speech is the source of the individual self, it is also the source of the polity's self. It provides a means of acquiring knowledge as a basis upon which society's decisions can be initially made and subsequently reevaluated. Just as the individual self uses speech to gain knowledge toward planning its life, the communal self seeks an understanding of the reality of the world as a means to make the exercise of its will effective, thriving through the larger conversation of the polity. While the individual cannot hope to complete its process of discovering the totality of external reality, such a discovery, in Charles Peirce's conception, is precisely the goal of the infinitely ongoing communal effort, and it can be achieved only through the combined efforts of individuals.²⁸

The aim of a democratic society is no less ambitious than to increase knowledge and thereby to enable its citizens, together and individually, to determine their conception of the good life, continuously redefining it on the most comprehensive basis possible. Speech does not merely enable this process, it *is* the process. And while the acquisition of knowledge through the polity's dialogue may at times be difficult and even painful,²⁹ such pain—far from inimical to the self-realization process—is an unavoidable part of it. In a profound sense then, speech is the engine of political self-determination; and if this is the case, free speech principles in fact drive—rather than derive from—the Constitution's insistence on political equality. Promoting social equality at the expense of speech risks not just the democratic system but any system of government that would hope to place the essence of humanity at its center. The inevitable conclusion is this: If efforts made in a quest for social equality are permitted to impinge on the freedom of speech, those efforts will prove to be, in more senses than one, self-defeating.

as elections.”); see also Karst, *supra* note 14, at 52–59; Post, *Free Speech*, *supra* note 13, at 279–85; Post, *Meiklejohn's Mistake*, *supra* note 13, at 1116–18.

²⁸ See *infra* notes 228–34 and accompanying text.

²⁹ See Ronald Dworkin, *The Coming Battles over Free Speech*, N.Y. REV. OF BOOKS, June 11, 1992, at 55, 61 (reviewing ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991)) (“Every powerful and controversial idea has a potential negative impact on someone's self-esteem.”).

II. SPEECH AND THE SELF

The truth is that man's capacity for symbol-mongering in general and language in particular is so intimately part and parcel of his being human, of his perceiving and knowing, of his very consciousness itself, that it is all but impossible for him to focus on the magic prism through which he sees everything else.

Walker Percy³⁰

A. Theoretical Beginnings

For those who favor restricting speech that degrades women and racial and ethnic minorities, the questions of the inherent character of speech and the consequent reasons for its protection are of something less than paramount concern.³¹ Whatever the framers of the First Amendment were about, these commentators seem to imply, we cannot now accept the idea that oppression and subordination of the powerless is any part of the constitutional purpose of free speech, particularly in light of the adoption of the more recent (and so controlling³²) Fourteenth Amendment. Most often, the closest that equalitarian critics get to an exploration of the purpose of speech rights is an identification of categories of speech unprotected under current doctrine, followed by a construction and extension of the exceptions to allow for the measures the critics propose.³³ Such a limited approach to the theoretical issues at hand cannot be expected to lay a stable foundation for a wholesale alteration of the generally accepted view of the Free Speech Clause. However one comes out on the ultimate issue, surely some sustained inquiry into the reasons for protecting speech is in order.

Of course, this question has hardly languished from inattention in the general scholarship. Of those broad justifications for free speech that have been advanced, the present argument attaches the greatest significance to that which

³⁰ PERCY, MESSAGE IN THE BOTTLE, *supra* note 16, at 29.

³¹ In this body of the literature, the most extensive discussion of the theoretical basis of First Amendment doctrine (although not of speech itself) occurs in Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989), reprinted in MATSUDA ET AL., *supra* note 6, at 17, 31-35. Even so, the passage amounts to little more than a nod in the direction of what is presented as a questionable tradition.

³² See *supra* note 10 and accompanying text.

³³ See, e.g., Lawrence, *If He Hollers*, *supra* note 7, at 66-71 (section entitled "Racist Speech as the Functional Equivalent of Fighting Words"); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 613-17 (analogizing harms of pornography to those of other types of unprotected speech).

several commentators have denominated variously as "individual self-fulfillment,"³⁴ the "liberty model,"³⁵ and "individual self-realization."³⁶ Although these theories, as developed by their respective sponsors, are marked by differences and distinctions among them, they share the core proposition that speech is singled out by the Constitution for special protection because of its unique role in allowing the individual to define herself. As influential as this position has been, however, it has not escaped objections. The aim of this Part is to provide a description of the deep structure of the function of speech and in so doing answer those objections in a way that ultimately clarifies the full import of the relationship of speech to social equality.

The importance of speech for self-realization has been recognized by the Supreme Court, but that recognition has been intermittent and uncertain. This ideal of self-realization finds its most explicit statement in the concurrence of Justice Brandeis in *Whitney v. California*.³⁷ "Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . They valued liberty both as an end and as a means."³⁸ To the degree that freedom of speech is valued as an end, that end is self-realization, the development of human faculties.³⁹ The Court's more modern free speech

³⁴ See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 879-81 (1963).

³⁵ See C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 964 (1978).

³⁶ See MARTIN H. REDISH, FREEDOM OF EXPRESSION 11 (1984).

³⁷ 274 U.S. 357 (1927).

³⁸ *Id.* at 372 (Brandeis, J., joined by Holmes, J., concurring).

³⁹ See Dworkin, *supra* note 29, at 57 (calling Brandeis's statement "a classic endorsement of the constitutive view" of speech). Dworkin also quotes Anthony Lewis's judgment that this passage is "the most profound statement ever made about the premises of the First Amendment." *Id.* at n.9.

Not everyone reads this passage the same way, however. Professor Sunstein agrees that Brandeis finds both an intrinsic and instrumental value in speech. But for Sunstein, the intrinsic value, while still called liberty, is construed to be limited to a liberty "to be able to develop one's capacities in a way that promotes courage, self-mastery, virtue." SUNSTEIN, *supra* note 8, at 28. But Brandeis's opinion views liberty in this context, not as restricted in this way, but rather as "that freedom to think as you will and to speak as you think." *Whitney*, 274 U.S. at 372. While Brandeis is undeniably optimistic about the *ultimate* results of allowing such freedom, he does not delimit it to only that which will produce certain results. Sunstein's notion of the freedom to speak recalls the choice of automobile color given to Henry Ford's customers—you can think and say anything you want, so long as it promotes virtue.

opinions, though, have made much less of this rationale than did Brandeis.⁴⁰ While cases such as *West Virginia State Board of Education v. Barnette*,⁴¹ *Wooley v. Maynard*,⁴² and *Stanley v. Georgia*⁴³ have supplied additional classic affirmations of the First Amendment's purpose of protecting speech as a way of ensuring "individual freedom of mind,"⁴⁴ it has been left largely to the commentators to explain and promote the theory of self-realization.

In a celebrated essay, Thomas Emerson suggested four values behind the constitutional protection of speech: (1) individual self-fulfillment, (2) attainment of truth, (3) participation in decision-making, and (4) balance between stability and change.⁴⁵ The present argument, while it envisions a role for each of these values, sees self-fulfillment as primary, giving rise to the others. Emerson hints at a similar conclusion both by listing this value first and by affirming "the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being."⁴⁶ This realization takes place principally in the mind and is most facilitated, Emerson states, by the exercise of the capacity to form and express opinions and beliefs.⁴⁷ In this way, the First Amendment creates an enclave for expression and treats speech differently from other forms of human action, exempting it from society's usual powers of control on the ground that "it is not a general measure of the individual's right to freedom of expression that any particular exercise of the right may be thought to promote or retard other goals of the society."⁴⁸

⁴⁰ See Dworkin, *supra* note 29, at 57-58 (discussing as imprudent Justice Brennan's reliance, in *New York Times v. Sullivan*, 376 U.S. 254 (1964), almost exclusively on the instrumental rather than the constitutive value of speech).

⁴¹ 319 U.S. 624 (1943).

⁴² 430 U.S. 705 (1977).

⁴³ 394 U.S. 557 (1969).

⁴⁴ *Wooley*, 430 U.S. at 714. *Barnette* includes an often quoted casting of this idea: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. And *Stanley* held that "the power to control men's minds" and "the right to control the moral content of a person's thoughts" are "wholly inconsistent with the philosophy of the First Amendment." *Stanley*, 394 U.S. at 565-66.

⁴⁵ Emerson, *supra* note 34, at 878-86; see also THOMAS EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-7 (1970) [hereinafter EMERSON, *FREEDOM OF EXPRESSION*].

⁴⁶ Emerson, *supra* note 34, at 879.

⁴⁷ *Id.*

⁴⁸ *Id.* at 880. The discussion, *infra*, in Part III will argue that while no "particular exercise of the right" is to be measured by its contribution to a predetermined, substantive

Edwin Baker, in expatiating on his "liberty theory" of speech, looks to two of Emerson's four values, self-fulfillment and participation in societal decision-making, explaining the remaining two as "derivative."⁴⁹ The two favored values, Baker reasons, demonstrate that a correct interpretation of the right to free speech would "delineate[] a realm of individual liberty roughly corresponding to noncoercive, nonviolent action" protecting speech "because of the way the protected conduct fosters individual self-realization and self-determination without improperly interfering with the legitimate claims of others."⁵⁰ Martin Redish also considers Emerson's framework, along with the theories of other scholars, and concludes that "the constitutional guarantee of free speech ultimately serves only one true value, . . . 'individual self-realization'" and that the many suggested alternative values, while valid, "are in reality subvalues of self-realization."⁵¹ For Redish, the fact that "all forms of expression that further the self-realization value" are constitutionally protected is objectively demonstrable by reference to our chosen form of democratic government.⁵²

Thus, all three theories hinge upon the idea that speech, as distinguished from other forms of action in degree if not in kind,⁵³ bestows upon people a power to create themselves. Yet, this claim of singularity has time and again been doubted. Frederick Schauer, for example, pointedly asked the question, "Must Speech Be Special?"⁵⁴ While in Schauer's view the First Amendment's language itself makes it clear that speech is prescriptively special, the more difficult question remains whether speech is special descriptively, whether any hypothesis of speech's nature can satisfactorily separate it from other kinds of conduct so as to merit the different treatment commanded by the First Amendment. The answer to that question, according to Schauer, "is probably 'No,'"⁵⁵ creating a logical inconsistency between reality and the constitutional mandate requiring further scholarly attention. Robert Bork, among others, has expounded a similar view, arguing that all of the underlying justifications put

end, the exercise of the individual right is what makes possible the achievement of Emerson's other three values.

⁴⁹ Baker, *supra* note 35, at 991.

⁵⁰ *Id.* at 964, 966.

⁵¹ REDISH, *supra* note 36, at 11-12. The term self-realization, as used by Redish, may include a wider range of phenomena than is meant by Emerson or Baker: "[I]t can be interpreted to refer either to development of the individuals' [sic] powers and abilities . . . or to the individual's control of his or her own destiny through making life-affecting decisions I intend to include both interpretations." *Id.* at 11.

⁵² *Id.* at 12.

⁵³ See Emerson, *supra* note 34, at 879; REDISH, *supra* note 36, at 18-19.

⁵⁴ Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284 (1983).

⁵⁵ *Id.* at 1306.

forth for speech rights, with the sole exception of enhancement of political discourse, fail to explain what speech does that other human activities cannot do.⁵⁶ And recently, Stanley Fish has taken the argument to its extreme, suggesting that speech is entirely indistinguishable from other action and that protecting speech can have no purpose other than to protect some underlying political program favored by those who have the power to manipulate First Amendment doctrine.⁵⁷ "Speech, in short, is never a value in and of itself," Fish says, "but is always produced within the precincts of some assumed conception of the good to which it must yield in the event of conflict."⁵⁸ When it comes to defining speech rights, Fish insists that we are all

⁵⁶ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 25 (1971) (arguing that the benefits of speech in developing individuals' faculties are . . . indistinguishable from the functions or benefits of all other human activity). Curiously, Bork goes on to suggest that only political speech is protected by the First Amendment, since speech's "ability to deal explicitly, specifically and directly with politics and government, is different from any other form of human activity." *Id.* at 26. On the contradiction in Bork's analysis, see REDISH, *supra* note 36, at 17 ("Bork's conclusion that political speech should be protected is, however, inconsistent with his belief that any acceptable rationale for free speech must be logically unique to speech. For there are countless actions . . . that can be thought to convey very significant political messages."). Redish's comment on the inconsistency in Bork's reasoning does not, however, in itself explain why speech is unique in this regard, and Bork's point continues to be made by others. See, e.g., FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 57 (1982) ("The fact that communication will produce the desired result does not mean that that same result cannot also be produced by *experiences*."); Baker, *supra* note 35, at 975 ("The problem with this defense is that the individual is as likely to find needed information in experiences as in speech."); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 78 ("As a liberation of the human spirit, speech is no more pivotal than is any other human activity."). Both Emerson and Redish do attempt to answer this charge, saying essentially that speech tends to cause less harm than action. EMERSON, *FREEDOM OF EXPRESSION*, *supra* note 45, at 9; REDISH, *supra* note 36, at 18-19; see also Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 138 (1989) ("The wider applicability of a reason for protecting liberty would not necessarily undercut its relevance for a distinctive free speech principle; the reason might have a special intensity for speech or coalesce in a special way with other reasons in respect to speech.").

⁵⁷ See STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH* 106 (1994) ("[I]nsofar as the point of the First Amendment is to identify speech separable from conduct and from the consequences that come in conduct's wake, there is no such speech and therefore nothing for the First Amendment to protect."); see also *id.* at 16 ("[T]he First Amendment does not . . . direct a politics but will display the political 'spin' of whatever group has its hand on the interpretive machinery."); Stanley Fish, *Fraught with Death: Skepticism, Progressivism, and the First Amendment*, 64 U. COLO. L. REV. 1061 (1993).

⁵⁸ FISH, *supra* note 57, at 104.

consequentialists.⁵⁹ The project for the remainder of this Part is to offer a basis for understanding speech that overcomes the objections of these critics of the self-realization value and, more specifically, supplies the basis of a defense of speech rights against infringement in the name of social equality.

B. *Speech and Being Human*

Speech is special. As a descriptive matter, speech is not only different in kind from all other human activity but also unlike literally any other sort of event in the universe. What is more, the way in which speech is special correlates precisely with the reasons why it deserves greater constitutional protection than is accorded to other types of conduct. The capacity for and the practice of intentionally communicative activities give meaning to words and phrases such as human rights, human dignity, moral agency, the sacredness of the individual, and autonomy. In fine, speech is what makes human beings significantly human.

These are bold claims, more empirical than theoretical, and their persuasiveness will depend upon the strength of the evidence that can be adduced to support them. The works of one writer, Walker Percy, focus intently on the question of the significance of speech,⁶⁰ and the results have much to offer for an understanding of the theoretical value of speech and the constitutional consequences thereof. Percy notes that the essence of the phenomenon of language has gone largely unexplained: while the layman is uninterested,⁶¹ scientists have minutely explored the physiological properties of the speech act and the structural nature of language, but have nothing whatsoever to say about "the actual event of language[, t]he central

⁵⁹ *Id.* at 13–15. *But see* Dworkin, *supra* note 29, at 61 n.18 (responding that Fish "confuses people's reasons for speaking, which are of course to promote some other purpose, with the reasons government might have for protecting their right to speak, which may include constitutive as well as instrumental reasons").

⁶⁰ It might be said that Percy was peculiarly equipped for the task of looking at and explaining the phenomenon of language. A scientist, a physician by training, he spent at least 35 years (until his death in 1990) writing what is sometimes called technical philosophy about the subject of human communication. And for the last 30 years or so of this period, he also wrote novels, using language to explain what it means to be human. *See* Patrick H. Samway, S.J., *Introduction*, in WALKER PERCY, *SIGNPOSTS IN A STRANGE LAND* ix, x–xi (Patrick Samway ed., 1991).

⁶¹ "Since [the layman] is a language creature and sees everything through the mirror of language, asking him to consider the nature of language is like asking a fish to consider the nature of water. He cannot imagine its absence, so he cannot consider its presence." Walker Percy, *Questions They Never Asked Me*, *ESQUIRE*, Dec. 1977, *reprinted in* PERCY, *supra* note 60, at 397, 419–20.

phenomenon[, w]hat happens when people talk, when one person names something or says a sentence about something and another person understands him.”⁶² In light of this situation, it is not surprising that supporters of the various versions of the self-realization value of speech have been forced to rely on the mere intuition, the more or less commonsensical proposition, that speech is importantly different from other human activities.⁶³ Neither is it surprising that other critics’ doubts about and denials of that same intuition⁶⁴ have resulted in the discussion coming to something of a stalemate. But this need not be the case.

Percy’s approach is quite different from the traditional analysis of free speech issues; indeed, his interest in speech is entirely unrelated to legal and constitutional questions. Yet if the approach is different, it is in fact an attempt to get at the same questions from the other side of the problem. Instead of taking the current doctrinal scope of the speech right as a starting point and then finding reasons based in political theory upon which either to contract or expand the right, Percy’s method offers something much closer to the attitude of the scientist who observes a particular behavior and seeks to explain it. So despite—or perhaps *because of*—the difference in approach, the resulting explanation of the phenomenon of human speech, root and branch, might prove a valuable tool, previously unavailable to those interested in the theoretical basis of the First Amendment.

Of course, even a scientist will have a motivation for selecting the subject of her observation. Percy’s motive in this matter, far from unrelated, is nearly identical to the concerns of proponents of the self-realization theories of speech. Percy is interested in understanding the human capacity for language, because he believes that such an understanding is the only way to formulate a tenable theory of human beings. He identifies the two currently governing and simultaneously-held general theories: (1) the scientific view of the human being as an organism in an environment, not qualitatively different from other

⁶² PERCY, MESSAGE IN THE BOTTLE, *supra* note 16, at 13–14.

It is as if neither Dr. Harvey nor anyone else had ever discovered that the heart is a pump and that the blood circulates but in the past three hundred years scientists had amassed huge quantities of data about the chemical reaction of heart muscle, and the composition of blood, had described the distribution of the elements of blood, had made comparisons of the blood systems of thousands of mammals, and, finally, had developed a sophisticated computerized method for calculating the velocity and pressure of the blood in any given artery.

Id. at 15.

⁶³ See *supra* notes 45–53 and accompanying text.

⁶⁴ See *supra* notes 54–59 and accompanying text.

organisms, and (2) the "attenuated legacy of Christianity," which sees people as uniquely possessed of "certain inalienable rights, . . . [with the] consequence [that] the highest value to which a democratic society can be committed is the respect of the sacredness and worth of the individual."⁶⁵ These two theories, accepted in combination as they currently are, suggest a conventional wisdom that is "radically incoherent."⁶⁶ The way out of the dilemma, according to Percy, is through study of the activity in which humans spend the better part of their time, "which even Darwin agreed sets them apart from the beasts,"⁶⁷ and yet about which we know almost nothing:

Instead of marking [man] down at the outset as besouled creature or responding organism, why not look at him as he appears, not even as *Homo sapiens*, because attributing sapience already begs the question, but as *Homo loquens*, man the talker, or *Homo symbolificus*, man the symbol-monger? Instead of starting out with such large vexed subjects as soul, mind, ideas, consciousness, why not begin with language, which no one denies, and see how far it takes us toward the rest?⁶⁸

Language, one of the two things about which scientists do not have an adequate theory, might thus be the key to the other thing about which scientists also lack a theory, *i.e.*, the human animal.

For Percy, the key to the natures both of language and of human beings is to be found in a scene from the life of the eight-year-old Helen Keller, one familiar to many perhaps from the film or theatrical version of the story. The significance of the scene, however, is most clearly revealed by Helen Keller's own telling of the incident in her autobiography, and it is worth reproducing here. In his discussion of the passage, Percy reminds us that from the time in her infancy when she had been struck both blind and deaf until the moment recounted below, "Helen had learned to respond like any other good animal: When she wanted a piece of cake, she spelled the word in [her teacher] Miss Sullivan's hand and Miss Sullivan fetched her the cake Then Miss Sullivan took her for a walk."⁶⁹

We walked down the path to the well-house, attracted by the fragrance of the honeysuckle with which it was covered. Someone was drawing water and my teacher placed my hand under the spout. As the cool stream gushed over one hand, she spelled into the other the word *water*, first slowly then rapidly. I

⁶⁵ PERCY, MESSAGE IN THE BOTTLE, *supra* note 16, at 20.

⁶⁶ *Id.*

⁶⁷ *Id.* at 16.

⁶⁸ *Id.* at 17.

⁶⁹ *Id.* at 34.

stood still, my whole attention fixed upon the motion of her fingers. Suddenly I felt a misty consciousness as of something forgotten—a thrill of returning thought; and somehow the mystery of language was revealed to me. I knew then that “w-a-t-e-r” meant the wonderful cool something that was flowing over my hand. That living word awakened my soul, gave it light, hope, joy, set it free! There were barriers still, it is true, but barriers that could in time be swept away.

I left the well-house eager to learn. Everything had a name, and each name gave birth to a new thought. As we returned to the house every object which I touched seemed to quiver with life. That was because I saw everything with the strange, new sight that had come to me. On entering the door, I remembered the doll I had broken. [She had earlier destroyed the doll in a fit of temper.] I felt my way to the hearth and picked up the pieces. I tried vainly to put them together. Then my eyes filled with tears; for I realized what I had done, and for the first time I felt repentance and sorrow.

I learned a great many new words that day. I do not remember what they all were; but I do know that *mother*, *father*, *sister*, *teacher* were among them—words that were to make the world blossom for me, “like Aaron’s rod with flowers.” It would have been difficult to find a happier child than I was as I lay in my crib at the close of that eventful day and lived over the joys it had brought me, and for the first time longed for a new day to come.⁷⁰

Helen Keller’s entry into a world of speech took her from being “a good responding organism[,] . . . little more than an animal” to being a “symbol-mongering human[,] . . . wholly human.”⁷¹ Percy notes that not only does this scene compress the “months of the naming phase” of the normal human two-year-old but also, “if the biologist’s motto were true and ontogeny does recapitulate phylogeny, then Helen’s breakthrough must bear some relation to the breakthrough of the species itself.”⁷² In the story of Helen Keller’s “rebirth” into the world of language, Percy finds an encapsulation of the event that might hold the answer to his question.⁷³ In trying to understand what happens when a creature becomes able to name its world, a power quite different from any other the creature possesses, and—crucial for the issue of the First Amendment—in trying to understand the results that flow from that power, Percy made a kind of discovery. It was a discovery that he later learned

⁷⁰ HELEN KELLER, *THE STORY OF MY LIFE* (1965), *quoted in* PERCY, *MESSAGE IN THE BOTTLE*, *supra* note 16, at 34–35 (editorial insertion in PERCY).

⁷¹ PERCY, *MESSAGE IN THE BOTTLE*, *supra* note 16, at 38; *see also* PERCY, *supra* note 60, at 281 (“It was nothing less than the beginning of her life as a person.”).

⁷² PERCY, *MESSAGE IN THE BOTTLE*, *supra* note 16, at 38.

⁷³ “It was like holding a test tube of pure uranium which had been smelted from thousands of tons of ore-bearing rock. I was looking straight at it, but what to make of it?” *Id.*

had been made by Charles Peirce at the turn of the century, although “no one had paid much attention, not even Peirce’s greatest admirers.”⁷⁴ It is Peirce’s explication of the nature and effects of the speech phenomenon, together with Percy’s grasp of the implications of this work, that allow us to see both that speech is special and why, as a constitutional matter, we should care.

C. *The Triadic Nature of Speech*

1. *The Mechanism of Speech*

Speech is distinguished from all other human activities—from all other events of any kind—in the following way. Every nonspeech phenomenon in the universe can be termed, in Peirce’s word, dyadic.

An event A, may, by brute force, produce an event, B; and then the event, B, may in its turn produce a third event, C. The fact that event, C, is about to be produced by B has no influence at all upon the production of B by A. It is impossible that it should, since the action of B in producing C is a contingent future event at the time B is produced. Such is dyadic action, which is so called because each step of it concerns a pair of objects.⁷⁵

As Walker Percy explains, this concept encompasses all natural phenomena as well as all nonspeech events effected by and upon humans.⁷⁶ Even the life processes of organisms and the interactions among organisms, though different in many ways from other natural occurrences, are nothing but more complex variations of dyadic relations. Indeed, Percy maintains that animal behavior that is often likened to and even held up in fact to be speech is nothing but a sequence of dyads.⁷⁷

Human expression through the use of signs, what Peirce calls semiosis, is not dyadic, but triadic, since it “involves . . . a cooperation of *three* subjects, such as a sign, its object, and its interpretant, this tri-relative influence not

⁷⁴ *Id.* at 39; see also CHRISTOPHER HOOKWAY, PEIRCE 120 (1985) (stating that Peirce’s study of semiotics “provides a fundamental and illuminating academic discipline with a promise that was heralded by Peirce but lost to much of twentieth-century philosophy”).

⁷⁵ 5 CHARLES S. PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE ¶ 472 (Charles Hartshorne & Paul Weiss eds., 1931–1935).

⁷⁶ See *supra* note 16; see also PERCY, *supra* note 15, at 87 (“The planet Saturn has an influence upon me; it exerts a small gravitational attraction. I in turn exert a slight pull not only on the planet Saturn but upon the entire M31 galaxy in Andromeda.”).

⁷⁷ *Id.* at 92–95 (explaining the so-called language of animals trained by behaviorists as learned responses not qualitatively different from Pavlov’s dogs). Peirce himself is in accord with such a view. See 5 PEIRCE, *supra* note 75, ¶ 533.

being in any way resolvable into actions between pairs.”⁷⁸ When a person (the interpretant) understands a word (the sign) to stand for a thing (the object), she is partaking in speech activity, which cannot be understood as or broken down into a series of dyadic events: the process of speech embraces all three elements irreducibly.⁷⁹ The difference between dyadic and triadic behavior can be highlighted by reference to Helen Keller’s breakthrough into language.⁸⁰ Percy points out that before her breakthrough, when her teacher spelled the word “cake” in her hand, Helen responded by looking for cake, much as a dog, hearing its master say the word “ball,” might run in search of a ball. But after the incident in the well-house, Helen knew that the word “water,” spelled into her one hand, *meant*—was the name for—the liquid that was simultaneously pouring over her other hand and, further, “[s]he then wanted to know the names of other things.”⁸¹ The former episode illustrates a dyadic event and is fully explained by the learning theory of social scientists such as B.F. Skinner, while the latter event is the archetype of triadic relations and transcends all behaviorist conceptions of stimulus and response.⁸²

Further evidence of the distinctive qualities of triadic behavior emerges when one considers the relationship between the sign and the object. Percy expands upon an example offered by Peirce: when a young child learns that an object he sees is a balloon, the process that takes place is of a different order from that involved when a dog salivates at the sound of a buzzer. Obviously, the word “balloon” is only an arbitrary combination of letters or sounds chosen to designate a class of things. But when his father tells the boy that the word stands for the thing (“That’s a balloon”), the sign and the object become interpenetrated, joined by the copula “is”: the thing *is* the word. The interpenetration, however, is not a complete identity, for the actual object is, of course, not the word “balloon.” Yet the boy’s knowledge of the object is transformed by the naming of it.⁸³ Likewise, the word-sign is something more than a sound or marks on a page that “mean” the object, “[f]or it is precisely the nature of the boy’s breakthrough that he understands his father’s utterance

⁷⁸ 5 PEIRCE, *supra* note 75, ¶ 484.

⁷⁹ See 8 CHARLES S. PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PIERCE ¶ 361 (Arthur W. Burks ed., 1958). The terminology used herein is Peirce’s. Other writers have used any number of variations on the terms.

⁸⁰ See *supra* text accompanying notes 69–73.

⁸¹ See PERCY, MESSAGE IN THE BOTTLE, *supra* note 16, at 164.

⁸² *Id.*

⁸³ The thing itself is changed by being named. “It is precisely the nature of the boy’s breakthrough that the object he points to is understood by him as a member of a class of inflated objects. A few minutes later he might well point to a blue sausage-shaped inflated object and say ‘Balloon.’” *Id.* at 43; see also *id.* at 168–69.

as a particular instance of the word *balloon*.”⁸⁴ The sign “is not a concrete thing at all but a general one, a law.”⁸⁵ A dog has no such understanding of the sound of a buzzer that it has been conditioned to “understand” as meaning the arrival of food.

The sign and the object form but the two points at the base of the triadic triangle. Their relationship to one another is wholly dependent upon the existence of the third element at the apex, the human interpretant.⁸⁶ The implications of the triadic nature of speech for our understanding of this third element, the human who has the capacity to conjoin sign and object, are of crucial importance. Helen Keller, when she gained the power to name things, became a different sort of being, or at least a being with a new and transcendent character. In an action of which the behaviorist’s dog is incapable, she coupled “water” with water. But it is imprecise to say “she” coupled the sign and the object, for “she” existed before making the breakthrough to language. The question then becomes, as Percy says, “[W]ho, what couples? Who, what is the coupler? . . . All one can say for certain is that if two things which are otherwise unconnected are coupled, there must be a coupler.”⁸⁷ The coupler or, as Peirce called it, the interpretant, is that which allows human beings to speak to and comprehend one another. If we can come to some understanding of the qualities of this coupler, we will be that much further toward understanding exactly what it is about speech that we might want to protect.

2. *The Results of Triadicity*

The effects of the triadic capacity for language are several, and taken as a whole they lead to the conclusion that the self, the aspect of people that makes

⁸⁴ *Id.* at 43; *see also id.* at 171.

⁸⁵ *Id.* at 43; *see also* Peirce, *supra* note 1, at 39–40.

⁸⁶ The classical conception of signs, “the notion that a sign is essentially something that *stands for* another,” leaves out entirely the component of the human mind, and the same is true of other, more modern versions of semiology such as that of Ferdinand de Saussure. COLAPIETRO, *supra* note 17, at 4–5.

Peirce’s distinction between dyadic and triadic behavior has been noted before, but so pervasive has been the influence of what might be called dyadic behaviorism that Peirce’s “triadic relation” has been recognized only to the degree that it can be set forth as a congeries of dyads. . . . This is like saying that Einstein’s special theory will be accepted only to the degree that it can be verified by Newtonian mechanics.

PERCY, MESSAGE IN THE BOTTLE, *supra* note 16, at 162.

⁸⁷ PERCY, MESSAGE IN THE BOTTLE, *supra* note 16, at 44.

them human, is composed of nothing other than speech and thus that restrictions on speech undermine the basis of the self. While establishing these propositions will not dictate that the right of free speech be absolute, it will suggest a way of understanding the value of speech that logically excludes certain purposes—including the aims of social equalitarians—as illegitimate bases for circumscribing the right. But before reaching any such determination, we must first return to Peirce's description of the speech phenomenon and the role of the human interpretant within it.

A normal child is born with the capacity for language use but does not begin to exercise that capacity immediately, either in speaking or in understanding the speech of others. Directly related to this, Peirce finds, is the fact that in the period in human development preceding speech, the child lacks self-consciousness.⁸⁸ The child is, however, aware of his own body; indeed, his only relationship to the world is through "pure apperception," the direct stimulation of his senses:

Only what [the body] touches has any actual and present feeling; only what it faces has any actual color; only what is on its tongue has any actual taste.

No one questions that, when a sound is heard by a child, he thinks, not of himself as hearing, but of the bell or other object as sounding."⁸⁹

Yet he then becomes aware of others speaking, discovers the connection between "the motions of the lips of bodies somewhat similar to [his own body]" and his own lips, and so "begins to converse" almost instinctively.⁹⁰ This event is key, for the child begins to rely on the speech, the "testimony," of others to mediate between himself and the world. He finds that this testimony is able to correct his errors of ignorance about the state of his environment.⁹¹ "Thus, he becomes aware of ignorance, and it is necessary to suppose a *self* in which this ignorance can inhere. So testimony gives the first dawning of self-consciousness."⁹² And, Peirce might have added, this correction of errors of perception begins a life-long inquiry into the nature of the world.

⁸⁸ Charles S. Peirce, *Questions Concerning Certain Faculties Claimed for Man*, J. SPECULATIVE PHIL. (1868), reprinted in THE ESSENTIAL PEIRCE, *supra* note 1, at 11, 18–19.

⁸⁹ *Id.* at 19.

⁹⁰ *Id.*

⁹¹ "A child hears it said that the stove is hot. But it is not, he says; and, indeed, . . . [the child's] body is not touching it, and only what that touches is hot or cold. But he touches it, and finds the testimony confirmed in a striking way." *Id.* at 20.

⁹² *Id.*; see also COLAPIETRO, *supra* note 17, at 69–71; HOOKWAY, *supra* note 74, at 24–25; Antoni Gomila, *Peirce and Self-Consciousness*, in CHARLES S. PEIRCE AND THE PHILOSOPHY OF SCIENCE 318, 323–25 (Edward C. Moore ed., 1993).

This initiation into language, which stretches out over months in ordinary children, is the same one that, in Walker Percy's account, Helen Keller underwent in a matter of hours.⁹³ Concomitant with the creation of self-consciousness comes a new kind of consciousness of the external world.⁹⁴ When a child begins to learn the names of things, she enters a new state of being, or attains a new status. It is not that she simply desires out of idle curiosity to know what everything is called; in an important sense, she *needs* to know.⁹⁵ To a child who has made the breakthrough into language, the sign of a thing is the only means through which it can be known.⁹⁶ The result of this new medium of speech intermediating between the person and the external world is not to be seen as restricting, however; rather, instead of having her knowledge limited to the environment that she perceives through her senses, the sign-using child has a means through which to *know*, not merely an environment, but the world.

The . . . organism has an environment.

. . . .

The environment of an organism is those elements of the Cosmos which affect the organism significantly . . . and to which the organism either is genetically coded to respond or has learned to respond. There are many gaps in an environment A honey bee takes account of the bee dance of another bee indicating the direction and distance of a nectar source, but not of a grouse dance.

The sign-user has a world.

The world is segmented and named by language. All perceived objects and actions and qualities are named. Even the gaps are named. . . . The Cosmos is accounted for willy-nilly, rightly or wrongly, mythically or scientifically, its

⁹³ See *supra* notes 69–73 and accompanying text.

⁹⁴ See Gomila, *supra* note 92, at 325–30 (documenting support for this phenomenon from the fields of developmental and social psychology).

⁹⁵ PERCY, MESSAGE IN THE BOTTLE, *supra* note 16, at 255 & n.*.

⁹⁶ Using the Helen Keller phenomenon as an example, Percy puts it this way:

To express it in modern semiotical language, the water is conceived through the vehicle of the symbol. In Scholastic language, the symbol has the peculiar property of containing within itself *in alio esse*, in another mode of existence, that which is symbolized. Helen knows the water *through* and by means of the symbol.

Id. at 261 (footnote omitted).

past, present, and future. All men in all cultures know what is under the earth, what is above the earth, and where the Cosmos came from.⁹⁷

The result of the sign-using mode of existence, of being a language creature, is that all thought takes the form of signs.⁹⁸ It now becomes possible to say that thought, the part of us that couples objects and signs, is the self. This in turn means that the self is composed of signs, that is, of speech. Hence Peirce's statement that "my language is the sum total of myself; for the man is the thought."⁹⁹ It is in thought—in language—that we know our world by conjoining each object (*i.e.*, everything that can be named) with its name. Because one's self takes the form of thought and because thoughts take the form of language, the conclusion must be that the self is made up of language. Or, more properly, the self is a continuing flow of language,¹⁰⁰ for any thought produced by a sign is itself a sign and gives rise to other thought-signs.¹⁰¹

This brings us to a point of particular importance. The self as a flow of language is significant in that the flow is not random, but purposive.¹⁰² Just as

⁹⁷ PERCY, *supra* note 15, at 99; *see also* COLAPIETRO, *supra* note 17, at 71; PERCY, MESSAGE IN THE BOTTLE, *supra* note 16, at 173.

⁹⁸ *See* Peirce, *supra* note 88, at 23–24; *see also* Richard J. Bernstein, *Action, Conduct, and Self-Control*, in PERSPECTIVES ON PEIRCE 66, 78 (Richard J. Bernstein ed., 1965).

⁹⁹ Peirce, *supra* note 1, at 54.

¹⁰⁰ Peirce ties many of these notions together in the following passage:

[T]here is no element whatever of man's consciousness which has not something corresponding to it in the word; and the reason is obvious. It is that the word or sign which man uses is the man himself. For, as the fact that every thought is a sign, taken in conjunction with the fact that life is a train of thought, proves that man is a sign . . .

Id.

¹⁰¹ *See* HOOKWAY, *supra* note 74, at 121 ("The three terms of the relation are the sign itself, the object of the sign, and the interpretant, which is itself a sign and thus stands in the same triadic relation to a further interpretant!").

Peirce himself allows the initial difficulty of the concept:

It is hard for man to understand this, because he persists in identifying himself with his will, his power over the animal organism, with brute force. Now the organism is only an instrument of thought. But the identity of a man consists in the *consistency* of what he does and thinks, and consistency is the intellectual character of a thing; that is, is its expressing something.

Peirce, *supra* note 1, at 54.

¹⁰² *See* PETER SKAGESTAD, THE ROAD OF INQUIRY: CHARLES PEIRCE'S PRAGMATIC REALISM 130–31 (1981); *see also* Bernstein, *supra* note 98, at 79–82.

the self arises out of the mediating power of speech in the face of a clash between the perception and the experience of reality,¹⁰³ the self, one's use of language, is forever after driven by this power. The flow of language that is the self is directed toward harmonizing one's thoughts or beliefs about the world with the reality of it. When one's beliefs about reality are contradicted by one's experience, the resulting surprise encourages a modification of the belief.¹⁰⁴ Such surprises could be totally eliminated only by attaining perfect knowledge of the external world, which Peirce calls "an ideal."¹⁰⁵ And if this is unattainable in whole by any individual, the individual nonetheless acquires pieces of such knowledge as she, her thinking, is changed, "determined," by the very objects she uses signs to represent: "Not until our interpretants (our ideas or intellectual habits) are fully attuned to their objects will we avoid unexpected confrontations with a resistant reality. In this way, the real object determines or shapes our mind, our reservoir of intellectual habits."¹⁰⁶

The self in this sense is best understood as a continuing inquiry for the purpose of "the settlement of opinion" about reality,¹⁰⁷ and self-realization is the process of carrying out this inquiry.¹⁰⁸ Peirce in no way suggests that any

¹⁰³ See *supra* text accompanying note 92.

¹⁰⁴ "The reality of things consists in their persistent forcing themselves upon our recognition." 1 PEIRCE, *supra* note 75, ¶ 175; see also C.J. MISAK, TRUTH AND THE END OF INQUIRY: A PEIRCEAN ACCOUNT OF TRUTH 47-49 (1991) ("Peirce characterizes the path of inquiry as follows: belief—surprise—doubt—inquiry—belief.").

¹⁰⁵ See Peirce, *supra* note 1, at 52 & n.*.

¹⁰⁶ Nathan Houser, *Introduction*, in THE ESSENTIAL PEIRCE, *supra* note 1, at xx-xixxi. John Smith puts the point this way:

Peirce . . . distinguishes between the object as thought or the *immediate* object and the object that exerts itself in relation to other objects or the *dynamical* object. The immediate object is dependent on the sign, but the dynamical object reverses the relationship, because "[the dynamical object] is the Reality which by some means contrives to determine the Sign to its Representation." The dynamical object is thus no mere object of thought, but rather a source of effects; it is a dynamic center which has constraining power over the sign that is to represent it.

John E. Smith, *Community and Reality*, in PERSPECTIVES ON PEIRCE, *supra* note 98, at 92, 98 (quoting 4 PEIRCE, *supra* note 75, ¶ 536).

¹⁰⁷ Charles S. Peirce, *The Fixation of Belief*, POPULAR SCIENCE MONTHLY (1877), reprinted in THE ESSENTIAL PEIRCE, *supra* note 1, at 109, 115; see also, e.g., HOOKWAY, *supra* note 74, at 46-47.

¹⁰⁸ The self can only realize itself by exerting control over itself; and it can only exert control over itself by committing itself to ideals, since "self-control depends upon comparison of what is done with an ideal admirable *per se*, without any ulterior

self will be successful in attaining its "ideals"; people are prone to biases and mistakes, and any one person's life is simply too short to correct them all.¹⁰⁹ But it is not only our "mistakes" that distinguish us one from another, for we also exercise our wills through plans and purposes based upon our understanding of reality at any given time, and by doing so we take a part in determining the external reality of the world:

There are many ways to live in the world, and intellect does not constrain us to a single path. . . . We can deliberately . . . change our intellectual habits—which means that we can *change our minds*: and that means that we have some measure of control over which of the many possible futures will be ours.¹¹⁰

Each individual exercises her will based upon her understanding of the consequences her actions will have in the external world; *and by doing so*, each individual affects the external world as it exists for all other individuals. This view sees the self as "a living force in the present and a flexible orientation toward the future. . . . To be a self is to be in the process of becoming a self, a process that is never complete."¹¹¹ This inquiry, taking place through the use of language, enables learning and is the essence of human autonomy.¹¹²

Thus, self-realization through speech is achieved not merely by the individual's indiscriminate or random use of language, but rather by her

reason." Peirce maintained that the realization of the self demanded a series of acts by which the self surrenders itself to ever more inclusive ideals.

COLAPIETRO, *supra* note 17, at 95–96 (quoting an unpublished manuscript by Peirce).

¹⁰⁹ See SKAGESTAD, *supra* note 102, at 126; Smith, *supra* note 106, at 105–06.

¹¹⁰ Houser, *supra* note 106, at xi; see also ROBERT J. LIFTON, *THE PROTEAN SELF* 5 (1993) ("If the self is a symbol of one's organism, the protean self-process is the continuous psychic re-creation of that symbol. Although the process is by no means without confusion and danger, it allows for an opening out of individual life, for a self of many possibilities."); Gomila, *supra* note 92, at 320 (stating that one of "the central features of self-consciousness" is "the capability of setting, assessing, and modifying one's own goals").

¹¹¹ COLAPIETRO, *supra* note 17, at 76–77. Robert Lifton finds a similar strain of thought in the writings of Ernst Cassirer and Susanne Langer and concludes that "[t]he symbolizing self is *developmentally* sensitive to influences from early childhood but never entirely 'determined' in outcome by any of them. The evolving self, in constantly re-creating all such influences, traumatic or otherwise, becomes itself *causative* and always prospective or forward moving." LIFTON, *supra* note 110, at 28–29; see also PERCY, *supra* note 15, at 85–87 n.* (acknowledging Cassirer and Langer as allies of Peirce).

¹¹² See COLAPIETRO, *supra* note 17, at 67–68, 89; see also HOOKWAY, *supra* note 74, at 56–57; BERNARD WILLIAMS, *Deciding to Believe*, in *PROBLEMS OF THE SELF* 136, 136–39 (1973) (stating that "beliefs aim at truth" and that engaging in belief is a uniquely human activity).

intentional use of language in forming a life-plan based on beliefs resulting from inquiry into external reality. Moreover, the external world includes other selves, that also traffic in the triadic behavior of speech. The speech of other selves may be the source of surprise and doubt, fueling one's own inquiry.¹¹³ But the relationship of a self to other selves should not be understood as simply antagonistic—although it surely can be that—any more than one's own self is at odds with itself as it was in the past or as it will be in the future. The flow of language that is the self takes place partially within the self as “a dialogue between different phases of the *ego*.”¹¹⁴ “[A man's] thoughts are what he is ‘saying to himself,’ that is, is saying to that other self that is just coming into life in the flow of time.”¹¹⁵ But the nature of the self as made up of signs creates the additional possibility of communication among a community of sign users. Indeed, the very nature of the sign is that it requires both a sign giver and a sign receiver.¹¹⁶ For Peirce, “to be a self is to be a *possible* member of some community The self is truly something unique and irreducible in itself, but what it is in itself is only revealed or, more accurately, realized through its relations with others.”¹¹⁷ Thus, for Peirce, communication among people was a process at least equally important to the realization of the self as internal thought.¹¹⁸ Being and becoming a self implicates speaking and listening to one's self and others.

We have here, then, something like an empirical basis for grounding the theories of the First Amendment scholars discussed earlier in this Part.¹¹⁹ Charles Peirce and those drawing out the implications of his work provide a

¹¹³ See *supra* note 104 and accompanying text. “Peirce insists that recalcitrant experience is the primary motivation for doubt, but he often mentions other things that can cause doubt, such as the contrary opinions of others” MISAK, *supra* note 104, at 48 n.4; see also HOOKWAY, *supra* note 74, at 71 (“[I]n controlling our practice of reasoning, . . . [a] further fixed element is provided by the opinions of others; we seek a harmony between our own opinions and those of our fellows, which enable us jointly to anticipate our joint experience and resolve disagreements.”).

¹¹⁴ 4 PEIRCE, *supra* note 75, ¶ 6.

¹¹⁵ Charles S. Peirce, *What Pragmatism Is*, in MONIST (1905), quoted in COLAPIETRO, *supra* note 17, at 91.

¹¹⁶ See PERCY, *supra* note 15, at 96.

¹¹⁷ COLAPIETRO, *supra* note 17, at 73–74 (citing 5 PEIRCE, *supra* note 75, ¶ 402 n.2).

¹¹⁸ See COLAPIETRO, *supra* note 17, at 79 (“For Peirce, then, the individual self is, in its innermost being, not a private sphere but a communicative agent.”); Smith, *supra* note 106, at 109 (“[T]he individual himself is a microcosm of the community since his own personal experience and thought involve him in a continual dialogue and dialectic of ideas.”). The significance of the exchange of meaning among people will be explored in detail, *infra*, in Part IV.

¹¹⁹ See *supra* notes 45–53 and accompanying text.

way of understanding speech not only as different from other activities but also as the cornerstone of the human self. Without the capacity for speech, humans would relate to their world and to each other as mere organisms in an environment. *Speech is special, different from human conduct of other sorts, because it imbues not only all conduct but also the world of the languaged creature with meaning.* The contention that experiences apart from communication contribute to self-realization in the same way as does speech¹²⁰ misses the essential point. The self-realization value to be derived from nonspeech experience *depends upon* the speech capacity, for without that capacity, activities and experiences such as travel and work would mean no more to us than they do to animals.

Yet it is more than just the capacity for speech that makes us human; it is the opportunity for the use of speech, both as speakers and listeners. What a person is can be determined only by her thoughts, which necessarily take the form of language—whether communicated to others or herself—the self flowing inexorably through an endless stream of thought. And because no one knows what turns that stream will take, the process of being human requires that all possible thought, all possible language, be open to her, both as a speaker and as a listener. In Vincent Colapietro's words:

A sign cut off from its future interpretants is a sign denied the possibility of realizing its essence; that is, the possibility of being a sign. Such a sign is the negation of semiosis; because it is impossible for it to realize its essence, the most accurate description of it is in negative terms, just as the most apt description of blindness is in privative terms. Thus, if the self is a sign and if it is cut off from its future developments, it has been denied the possibility of actualizing its essence; such a self is, in fact, the negation of selfhood.¹²¹

As Peirce himself expressed the matter: "Were the ends of a person already explicit [and antecedently fixed], there would be no room for development, for growth, for life; and consequently there would be no personality."¹²² Denying the possibility of engaging in certain kinds of speech is to go some part of the way toward fixing the human self in advance of its development and so destroying it. Individual self-realization is a process and not a predetermined result; it is, however, a process that moves toward a comprehensible point, the exercise of the individual's will in a state of complete knowledge of external reality. Although no individual self can expect to reach that point, it remains a fixed mark by which the course of self-realization is set.

¹²⁰ See *supra* notes 55–56 and accompanying text.

¹²¹ COLAPIETRO, *supra* note 17, at 77–78.

¹²² 6 PEIRCE, *supra* note 75, ¶ 157, quoted in COLAPIETRO, *supra* note 17, at 77 (editorial insertion in COLAPIETRO).

If, as Stanley Fish insists, all defenders of the speech right are in fact consequentialists promoting a necessarily "political" program beyond the promotion of speech for speech's sake,¹²³ the program put forward here is neither more nor less than preserving the conditions required for the fulfillment of human potentiality.¹²⁴ This conclusion has serious implications for the social equalitarian's proposals to limit speech. It is in order to understand those implications, that the next part of the discussion focuses on the idea of equality.

III. SPEECH AND EQUALITY

The importance of the idea of equality in modern society is demonstrated by the fact that hundreds of books on the subject have appeared in the last twenty years,¹²⁵ and were the figure to include articles in scholarly journals it might well number over one thousand. If the role played by notions of equality has diminished in the governing legal doctrine since the demise of the Warren Court,¹²⁶ it has nonetheless continued to thrive in the literature.¹²⁷ The increasingly popular employment of the goal of social equality as a rationale for circumscribing the Free Speech Clause is a particularly recent development.¹²⁸ Proponents of this position adamantly maintain that freedom of expression is meaningless without, and therefore must be subordinated to, a prior achievement of social equality.¹²⁹ Their defense of this proposition, though, is almost entirely conclusory, framing the issue as a contest between two provisions of the Constitution and throwing its rhetorical weight behind one, the Equal Protection Clause. On its face, the argument—that speech should not be immune from governmental regulation when it contributes to the disparities in social conditions among people—taps into a set of admirable motives as well as a powerful current of legal and political thought. Yet this superficial view

¹²³ See *supra* notes 57–59 and accompanying text.

¹²⁴ Fish grudgingly acknowledges the possible viability of something like this view as it is developed and tied to democratic theory in Part III. See *infra* notes 238–239 and accompanying text.

¹²⁵ See WESTEN, *supra* note 19, at 285.

¹²⁶ See ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 103 (1970) ("[A] broadly-conceived egalitarianism was the main theme in the music to which the Warren Court marched.").

¹²⁷ Providing a rough index for the last dozen years or so, a search of the JLR database (legal journals and law reviews) of WESTLAW in February 1995 revealed 807 documents published since 1981 whose titles include some form of the word "equal"; 247 of these titles use the phrase "equal protection" specifically.

¹²⁸ See *supra* notes 7–10 and accompanying text.

¹²⁹ See *supra* note 7.

belies the deeper reality that promoting equality by restricting speech rights is an internally contradictory project that damages rather than benefits its own highest ideals.

A. *Equality Theory*

Equalitarian critics, implicitly or explicitly, advance two claims: first, that the Equal Protection Clause calls for substantive social equality and second, that it therefore commands (or at least allows) the suppression of hate speech as a means of accomplishing this constitutionally prescribed end.¹³⁰ The second claim derives from and so depends upon the first. Because the Constitution insists on it, the argument runs, social equality serves as a compelling justification for limiting rights under the First Amendment.¹³¹ This understanding of the equalitarian argument is brought out, not to question the first claim of the ultimate goal of the Equal Protection Clause,¹³² but instead to examine the legitimacy of the second claim in light of the first. The question is, however much social equality the Clause may demand, whether it can legitimately be purchased by burdening the freedom of speech. This Part will examine the logical basis of the Equal Protection Clause and conclude that because of the nature of that basis, social equality cannot be achieved through the censorship of speech.

Any statement of prescriptive equality—for instance, that a group of persons *should* be treated equally in some sense—cannot stand on its own. If it is to carry any logical force, it requires two premises: (1) a discrete normative decision or rule dictating that the particular treatment in question, call it Y, is

¹³⁰ See *supra* notes 7–10 and accompanying text.

¹³¹ See, e.g., MACKINNON, *supra* note 3, at 107 (“Equality is a ‘compelling state interest’ that can already outweigh First Amendment rights in certain settings.”).

¹³² Obviously, this is not to suggest that everyone agrees on the proper understanding of the clause, far from it. See, e.g., WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* 21 (1988) (stating that at the time of the framing of the Civil War Amendments, support for the idea of equality came largely from “the very emptiness and vagueness of the concept The use of more precise arguments in support of a political program might tend to drive off potential support, but no one could be driven away by an argument for equality, since everyone believed in it”); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (advocating an antisubordination rather than an antidiscrimination approach to equal protection analysis); Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 56–62 (1990) (sketching three different current conceptions of the Equal Protection Clause); see also WESTEN, *supra* note 19, at 75–79 (arguing that the axiom “All persons are equal before the law” has at least seven different, sometimes contradictory potential meanings).

to be determined by a person's possession of some characteristic, X; and (2) a valid factual statement of descriptive equality to the effect that all of the persons in the group *are* equal in their possession of the characteristic X.¹³³ The characteristic X, in other words, is the subject of the actual equality as well as the determining factor (through the application of the rule that the treatment Y depends upon X) for the prescriptive equality. To illustrate these rather abstract formulations, imagine, for example, that you run a produce stand selling melons of many different kinds and sizes. A conceivable statement of prescriptive equality might be that you should sell each melon for the same price. But this prescription cannot be conjured *ex nihilo*. Following it would not make sense unless: (1) you have decided that the price given to each melon (Y) should be determined solely by a certain quality (X), say weight; and (2) all of the melons are alike in weight.

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|------------------------|--|
| Normative Rule: | (1) The price of a melon will be determined by its weight; |
| Descriptive Equality: | (2) All of the melons have equal weights; |
| Prescriptive Equality: | (3) Therefore, all of the melons should have the same price. |

If either (1) or (2) do not obtain—either you recognize different or additional factors (quality, wholesale costs) that should bear on the price you charge for any given melon, or the melons in fact have various weights—then the prescription is logically baseless.

Such an analysis can illuminate the Equal Protection Clause. The Clause is itself a statement of prescriptive equality: it specifies a group (persons) and

¹³³ Descriptive equality is an "is," not an "ought." One cannot infer that, because people *are* equal, they *ought to be treated* equally. To make the move from descriptive to prescriptive equality, one must do what is always necessary in moving from an "is" to an "ought": one must engage in moral or legal reasoning toward the formulation of a norm, a proposition that persons of a certain description deserve treatment of a certain kind. Without such norms, prescriptive equality is impossible because there is no standard by which people can be compared with respect to what they owe or deserve.

WESTEN, *supra* note 19, at 123; see also D.A. Lloyd Thomas, *Equality Within the Limits of Reason Alone*, 88 MIND 538, 538 (1979); Waldron, *supra* note 20, at 1353-55; Bernard Williams, *The Idea of Equality*, in PHILOSOPHY, POLITICS AND SOCIETY 110, 112 (Peter Laslett & W.G. Runciman eds., 1972) ("[P]olitical proposals have their force because they are regarded not as gratuitously egalitarian, aiming at equal treatment for reasons . . . of simplicity or tidiness, but as affirming an equality which is believed in some sense already to exist, and to be obscured or neglected by actual social arrangements.").

instructs that a certain treatment (protection of the laws) be given to them equally. The Clause is undoubtedly ambiguous in the reach of its prescription, leading to myriad battles such as those over various forms of affirmative action that continue to be fought in the arenas of politics and the courts.¹³⁴ This ambiguity need not concern us here, however, since for present purposes it will do to accept as broad a construction of the substantive results required by the Clause as social equalitarian critics care to propose. But one other uncertainty related to the Clause remains and must be put to rest before the question of speech restrictions in the name of social equality can be resolved. The problem can be illustrated by laying out the syllogistic structure underlying the Clause:

- | | |
|------------------------|--|
| Normative Rule: | (1) The level of protection of the laws a person receives will be determined by X; |
| Descriptive Equality: | (2) All persons are equal in respect of X; |
| Prescriptive Equality: | (3) Therefore, all persons have a right to equal protection of the laws. |

We know what the prescribed treatment is (protection of the laws), and we know the group to whom it is to apply and who must thus all be equal in virtue of some characteristic (persons). The uncertainty is this: What exactly is this characteristic that, as a descriptive matter, all persons possess and that, as a normative matter, has been decided to determine the level of "protection of the laws" a person deserves? The X in the logical formula underlying the Equal Protection Clause is unknown.

The constitutional status of the clause forecloses the possibility that we may freely reject it even should it turn out to lack—because of the nonexistence of X—the two premises requisite for a logically founded prescriptive equality statement, although such a finding would pose serious problems for its understanding and application.¹³⁵ But even if we could in some way be assured merely of the existence of X and so of the solidity of the underlying premises of the clause's prescription, it is nonetheless important also to know the identity of X, for that will suggest constraints on the methods by which the prescription of the Equal Protection Clause may be fulfilled. The next section will be devoted to three tasks: (1) explaining the requisites of a characteristic of

¹³⁴ See NELSON, *supra* note 132, at 138–47.

¹³⁵ These problems would be similar to those perceived by Schauer to exist within the First Amendment, since in Schauer's view the Free Speech Clause requires a protection of speech that is not compelled by any rational reason. See *supra* note 55 and accompanying text.

descriptive human equality, (2) identifying the speech capacity—and therefore the possession of a human self—as the only significant characteristic that satisfies those requirements, and (3) confirming that, as the basis of human equality, speech is also the determining factor in the independent normative rule for the distribution of protection of the laws.

B. *Identifying the Basis of Human Equality*

1. *The Nature of the Inquiry*

Of course, the Equal Protection Clause is not unique in presenting the idea that all people are equal and so should be treated equally. The philosophy of the Enlightenment along these lines, as set out in the *Declaration of Independence*¹³⁶ and the French *Declaration of the Rights of Man and of the Citizen*,¹³⁷ is perhaps the most familiar modern recapitulation of the thesis.¹³⁸ Yet these documents, like the Equal Protection Clause, merely imply the existence of a descriptive equality, declaring it to be “self-evident,” without naming its source. It may be that they do not mean to suggest any actual equality exists among all people, but only that human equality is to be taken as an “ethical judgment”¹³⁹ consented to by the governed.¹⁴⁰ To say that all human beings are equal in and only in the respect that they are all human is, however, to make a claim that is either manifestly inaccurate (given the evident differences among people “of stature, physique, intellect, virtue, merit, and desert”¹⁴¹) or useless for purposes of knowing how the descriptive equality should affect the treatment people are given, short of treating all people the

¹³⁶ “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights” DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), *reprinted in* THE IDEA OF EQUALITY 147, 147 (George L. Abernethy ed., 1959).

¹³⁷ “Men are born, and always continue, free and equal in respect of their rights.” DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. I (1789), *reprinted in* THE IDEA OF EQUALITY, *supra* note 136, at 156.

¹³⁸ See Brian Barry, *Equality*, in 1 ENCYCLOPEDIA OF ETHICS 322, 323 (Lawrence C. Becker & Charlotte B. Becker eds., 1992); see also Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1368 (1990) (reviewing WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT (1988)).

¹³⁹ See R.H. TAWNEY, EQUALITY 34, 40–42 (1931) (“[T]he word ‘Equality’ . . . may assert that while [men] differ profoundly as individuals . . . they are equally entitled as human beings to consideration and respect . . .”).

¹⁴⁰ See Yudof, *supra* note 138, at 1369.

¹⁴¹ Benn, *supra* note 23, at 61.

same way in all circumstances.¹⁴² If people are to be considered descriptively equal for some purposes and unequal for others, depending upon the treatment in question, it then becomes crucial either, on the one hand, to know the content of the underlying basis of human equality—so as to know whether it is implicated in the treatment in question—or, on the other hand, to be told by some authoritative source exactly which kinds of treatment are to be administered to all people equally.

The Equal Protection Clause generally exemplifies the second option (as do the Constitution's various grants of individual rights), for it tells us that all persons are to receive equal protection of the laws, though it does so without telling us why. But because the treatment that it specifies is left in vague terms, we remain at a loss to know precisely when the clause is and is not implicated by any given governmental act.¹⁴³ If we could avail ourselves of the first option by discovering the substantive content of human equality, two related results should follow. First, we would have a logical means, independent of the positivistic dictates of the Clause, for reasoning out the legitimate ends of equal protection. (This would be no panacea for interpreting the Clause, however, for it would still be necessary to decide whether a specific state action is or should be dependent upon the characteristic that constitutes human equality.) Second, and relevant for our purposes, identifying the descriptive equality upon which the prescription of the Clause is based would allow us to declare logically improper any means used to enforce the prescription that conflict with the two premises that the Clause needs to support it.

¹⁴² It cannot be the aim of this maxim [of equal humanity] that all men should be treated alike in all circumstances, or even that they should be treated alike as much as possible. Granted that, however, there is no obvious stopping point before the interpretation which makes the maxim claim only . . . that for every difference in the way men are treated, some . . . principle of differentiation must be given. . . . It would be in accordance with this principle, for example to treat black men differently from others just because they were black

Williams, *supra* note 133, at 111; see also J. ROLAND PENNOCK, *DEMOCRATIC POLITICAL THEORY* 40 (1979) ("The question of . . . what constitutes a relevant basis for treating some people differently from others . . . is enormously complicated and controversial."); Thomas, *supra* note 133, at 540–41.

William Nelson identifies this precise problem as lying at the root of understanding the equal protection component of the Fourteenth Amendment. See NELSON, *supra* note 132, at 138–39 ("[T]he congressional proponents of the Fourteenth Amendment were always able to specify whether a particular classification was reasonable or arbitrary. But they were persistently unable to elaborate how their conclusions were derived from or compelled by their more general theory.").

¹⁴³ See *supra* notes 132, 142 and accompanying text.

There have been many attempts to define the content of human equality.¹⁴⁴ Perhaps the original conception of an equality so fundamental that it embraces all people resides in the Christian doctrine of equality of people as soul bearers before God.¹⁴⁵ If we all shared the same faith, then, we might agree that the way in which all people are substantively alike is in their possession of a soul. However, it is not merely the absence of a common religious belief that renders this solution inadequate.¹⁴⁶ Indeed, the pursuit of a factual basis for human equality has supplied a number of secular substitutes for the soul. The most influential version has been that depicted by Kant, the equal possession by all of a rational nature, requiring that people be treated as ends in themselves rather than as means.¹⁴⁷ Kant's vision of the individual as a moral agent with free will, however, like the Christian conception of the soul, is a transcendental one, since it is not based on any empirical properties of persons.¹⁴⁸ As such, Kantian rational nature is for our purposes distinguishable from the Christian soul *only* by being a secular version of the same thing.¹⁴⁹ The same holds true for other candidates for the nature of human equality, such as "individual human worth" or "dignity of the individual," insofar as they simply apply a different label to some similarly ethereal quality.¹⁵⁰ And none of these can be

¹⁴⁴ For the Stoics, the descriptive standard was the possession of reason; for the Epicureans, it was the capacity to experience happiness; for Christians, it was knowledge of good and evil; for Hobbes, it was the capacity to kill and be killed; for Kant, it was rationality; for John Rawls, it is "moral personality," a capacity to make plans and give justice; and for others, it is the state of being "conscious beings who necessarily have intentions and purposes and see what they are doing in a certain light."

WESTEN, *supra* note 19, at 122-23 (quoting Williams, *supra* note 133, at 117).

¹⁴⁵ See, e.g., Sanford A. Lakoff, *Christianity and Equality*, in 9 [EQUALITY] NOMOS, *supra* note 23, at 115; Thomas, *supra* note 133, at 539; Williams, *supra* note 133, at 116.

¹⁴⁶ See Lakoff, *supra* note 145, at 119 ("[T]he Pauline Christian conception of equality was never a very clear guide to thought or action.").

¹⁴⁷ See IMMANUEL KANT, *THE FUNDAMENTAL PRINCIPLES OF THE METAPHYSICS OF MORALS* (1785), *excerpted in* THE IDEA OF EQUALITY, *supra* note 136, at 153, 153-55; see also AMY GUTTMAN, *LIBERAL EQUALITY* 33-41 (1980) (outlining Kant's theory of the rationality and moral capacity of human beings).

¹⁴⁸ See Williams, *supra* note 133, at 116 ("[I]n the Kantian view, the capacity to be a rational agent is not itself an empirical capacity at all.").

¹⁴⁹ The ground of the respect owed to each man thus emerges in the Kantian theory as a kind of secular analogue of the Christian conception of the respect owed to all men as equally children of God. Though secular, it is equally metaphysical: in neither case is it anything empirical *about* men that constitutes the ground of equal respect.

of any more use in specifying the descriptive ground of human equality than conclusory, ad hoc assertions to the effect that "all people are equal," such as those considered above.¹⁵¹ For unless an empirical basis of human equality can be found, it will be impossible to know when people must be treated equally and when they may be legitimately distinguished from one another.¹⁵²

2. *Speech and the Basis of Human Equality*

Recognizing the fatal limitation of nonempirical foundations for prescriptions of equality, philosophers have proposed a number of human characteristics in the hopes of finding one free from that weakness. In point of fact, they have proposed one characteristic, although each has given it a different name. D. A. Lloyd Thomas admits that Kant's "rational nature" is a transcendent rather than empirical quality; however, he suggests that it may be possible to "provide a rough indication of a non-transcendental counterpart."¹⁵³ All human beings might be said to possess a "practical rationality," a power that encompasses

the capacity to envisage ends, plans of action, and projects; and to adopt appropriate means to secure them. The adoption of appropriate means is to be understood as involving not only the more intellectually orientated activities of making one's plans consistent and discovering the appropriate means to secure them, but also a capacity of the 'will' to make one's actions conform to such plans.¹⁵⁴

As Thomas points out, this "practical rationality" is distinctly similar to John Rawls's notion of people as creatures capable of planning their lives.¹⁵⁵ Stanley Benn likewise finds rationality central:

¹⁵⁰ [I]f there are no ascertainable properties of people upon which their possession of "human worth" depends; or alternately, if there is nothing a person can do, or that can happen to him such that he can lose the properties upon which "human worth" is based, then we have on our hands something logically rather like the soul, re-packaged for secular consumption.

Thomas, *supra* note 133, at 541.

¹⁵¹ See *supra* notes 136–40 and accompanying text.

¹⁵² In other words, we must be able to determine when external circumstances overcome human equality to justify differential treatment. See *supra* notes 142, 150.

¹⁵³ Thomas, *supra* note 133, at 543.

¹⁵⁴ *Id.*

¹⁵⁵ See *id.*; see also JOHN RAWLS, A THEORY OF JUSTICE § 77 (1971). Other contemporary legal and political philosophers espouse positions along these lines. See, e.g.,

[E]ach of us sees in other men the image of himself. So he recognizes in them what he knows in his own experience, the potentialities for moral freedom, for making responsible choices among ways of life open to him, for striving, no matter how mistakenly and unsuccessfully, to make of himself something worthy of his own respect.¹⁵⁶

Bernard Williams reaches a similar conclusion, stating that people should be treated, in Kant's phrase, not as means but as ends, equal in themselves, since "men are conscious beings who necessarily have intentions and purposes and see what they are doing in a certain light."¹⁵⁷ Finally, Vinit Haksar effectively lumps all of these suggestions together when he says that "all human beings unlike animals have the potential to acquire certain capacities such as the ability to use language, self-consciousness, autonomy, the ability to form life-plans and to carry them out with zest, capacity for moral sentiments, capacity for sense of justice."¹⁵⁸

These various expressions of the actual equality among persons, while stressing different specifics, seem clearly to be getting at the same thing. If they continue to use phrases such as "moral capacity" and "moral freedom," phrases with some whiff of transcendentalism about them, it is perhaps because they have not yet gotten to the essence of the thing itself, but continue to circle around it, identifying its ancillary properties even as they close in on it. The discussion of Part II now enables this conclusion: The thing that allows humans to plan, to act autonomously with intentions and purposes, to be self-conscious, to exercise "practical rationality" is the existence of the human self as constituted by the capacity for and freedom to engage in the triadic behavior of speech. This realization was what Walker Percy, in the midst of his own search for a theory of the human creature, likened to the discovery of "pure uranium . . . smelted from thousands of tons of ore-bearing rock."¹⁵⁹

The awakening of self-consciousness in children, like that in Helen Keller—like that in the species *homo sapiens* itself—arrives with the creature's entry into the world of language.¹⁶⁰ This birth of the self through speech begins a continuous process that makes of the human environment a world, and of the human brain a mind.¹⁶¹ It is the hearing and the utterance of speech that

ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 49–50 (1974); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 204 (1986).

¹⁵⁶ Benn, *supra* note 23, at 70.

¹⁵⁷ Williams, *supra* note 133, at 117.

¹⁵⁸ VINIT HAKSAR, *EQUALITY, LIBERTY, AND PERFECTIONISM* 66–67 (1979) (enlisting the theories of Alen Gewirth and William James).

¹⁵⁹ PERCY, *MESSAGE IN THE BOTTLE*, *supra* note 16, at 38.

¹⁶⁰ See *supra* notes 71–72, 88–93 and accompanying text.

¹⁶¹ See *supra* notes 96–98 and accompanying text.

create social relationships by letting us, in Benn's words, recognize "in other men the image of [ourselves]."¹⁶² Finally, the capacity for and the opportunity to engage in speech create the human ability to reason and learn and thus to function as autonomous beings in planning their futures.¹⁶³ The triadic nature of speech and its creation of the self are thus at the core of all the characteristics that have been advanced as the basis of descriptive human equality. For each of these characteristics exists only by virtue of the speech capacity and they are empirically demonstrable only by reference to that capacity.

In order to say with confidence that a given characteristic constitutes the way in which all humans are descriptively equal, it has been suggested, it must be possible to demonstrate empirically that all people possess the characteristic, that they possess it to an equal degree, and that they alone among species possess it.¹⁶⁴ That all people have the power for language is, in one way, the least controversial of the three propositions, for it is open to confirmation by anyone who doubts it.¹⁶⁵ As Percy has said: "Language is unlike birds' flight. Some birds are superb flyers; others are lousy. But every normal human has

¹⁶² See *supra* notes 113–18 and accompanying text. Compare Benn's image, see *supra* text accompanying note 156, with one that Peirce himself uses:

The recognition by one person of another's personality takes place by means to some extent identical with the means by which he is conscious of his own personality. The idea of the second personality, which is as much to say that second personality itself, enters within the field of direct consciousness of the first person, and is as immediately perceived as his ego, though less strongly. At the same time, the opposition between the two persons is perceived, so that the externality of the second is recognized.

6 PEIRCE, *supra* note 75, ¶ 160.

¹⁶³ See *supra* notes 102–12 and accompanying text.

¹⁶⁴ See Thomas, *supra* note 133, at 540, 542, 547; see also HAKSAR, *supra* note 158, at 67–71.

¹⁶⁵ The capacity for language may be evidenced in human anatomical features:

[T]here are recently evolved structures in the human brain which have to do with speech and understanding speech, such as the inferior parietal lobule which receives information from the "primary sensory projection systems"; that is, the cerebral cortex which registers seeing and feeling water and hearing the word "water." These are described as "association areas."

PERCY, *supra* note 60, at 284 (quoting neuro-anatomist Norman Geschwind). But according to Percy, "what is important about the triadic event is that it is there for all to see, that in fact it occurs hundreds of times daily—whenever we talk or listen to somebody talking—that its elements are open to inspection to everyone." *Id.* at 286.

the capacity for uttering and understanding an infinite number of sentences in his language, no matter what the language is.”¹⁶⁶ This statement, by the way, also asserts the validity of the second proposition, that all humans have an equal capacity for speech; its truth is implicit in the fact that, in linguistic terms, “there is no such thing as a primitive language.”¹⁶⁷ In this sense, it is not the individual’s skill or facility in making use of her power of speech, but possession of the power itself.¹⁶⁸ The third proposition, that only the human species possesses the capacity for language, requires a word of explanation.

The explorations of both Charles Peirce and Walker Percy do indeed indicate that speech is peculiar to human beings.¹⁶⁹ Insofar as this fact may be doubted, however, a finding to the contrary would not weaken the present case. This is so because the only reason for including this criterion in the determination of whether the speech capacity constitutes a descriptive equality among humans is to exclude any other animal from the prescriptive results of the empirical equality statement,¹⁷⁰ and the argument here requires no such exclusion. Since those who frame prescriptions of equality usually assume humans to be importantly different from animals, the prescriptions—whether philosophical, moral, or legal (as in the Equal Protection Clause’s limited applicability to “persons”)—tend to take it as a given that this is the case. Consequently, philosophers who seek to explain the supporting logic of the

¹⁶⁶ *Id.* at 119.

¹⁶⁷ *Id.* (citing Edward Sapir, *Language*, in *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* (Edwin R.A. Seligman ed., 1937)).

¹⁶⁸ It might be objected that some people are not, to use Percy’s own word, “normal” in that they, through a congenital defect or the like, actually lack the mental ability to engage in triadic behavior. While some have thought it unnecessary to deal with the aberrational cases in a discussion of general human equality, *see, e.g.*, RAWLS, *supra* note 155, § 77, at 510; Williams, *supra* note 133, at 118, such evasion is not necessary. Of course, we do accept differential treatment for these individuals where their handicaps are implicated. *See* Benn, *supra* note 123, at 70. For a thorough argument as to why this does not eliminate the basis of the descriptive human equality, *see* HAKSAR, *supra* note 158, at 71–79; *see also* Barry, *supra* note 138, at 325–26.

¹⁶⁹ *See supra* notes 77–85 and accompanying text; *see also* PERCY, *supra* note 60, at 118–19 (stating that the neuro-anatomical structures that have been identified as possible centers of speech in the human brain are “not present or else extremely rudimentary in even the highest apes. Moreover, recent experiments have shown that if one destroys this cortical region in other primates, it has no effect on vocalization, which is mediated not by a cortical but rather by the limbic system”).

¹⁷⁰ *See* Thomas, *supra* note 133, at 542 (stating that unless the basis of equality excludes other species it would “hold out little hope of justifying some of the major moral distinctions we draw”).

prescriptions include this restriction in their explanations.¹⁷¹ But if it were proved that the speech capacity inheres in other animals, that finding would not change the treatment to be accorded to people; it would only suggest that whatever other animals have the same power should be eligible for the same treatment.¹⁷²

3. *Speech, the Self, and Protection of the Laws*

Having contented ourselves that the speech capacity fulfills the criteria of a descriptive basis of equality, we must still establish that it is *the* descriptive basis that underlies the prescriptive equality of the Equal Protection Clause. That is, in order for the human self, which results from speech, to be accepted as the key to the dictates of the Clause, not only must it describe a way in which all people actually are equal, it must also be the characteristic—as a result of a normative decision made independently of equality concerns—upon which the “protection of the laws” depends.¹⁷³ After all, human beings are equal (and even different from animals) in other ways not obviously connected to the power of language; they walk erect, for instance, and have opposable thumbs. And it is not merely the comparative right¹⁷⁴ of equal protection that depends upon the relevant descriptive human equality; noncomparative fundamental rights similarly belong to all people, notwithstanding the differences among them.¹⁷⁵ Yet few would argue, it seems safe to say, that an

¹⁷¹ See, e.g., RAWLS, *supra* note 155, § 77, at 504, 512.

¹⁷² “If we were able to establish communication with another species—dolphins, for instance—and found that they too were engaged in this ‘characteristically human enterprise,’ I think we should find ourselves thinking of them as a fishy variety of human being, making much the same claim on our consideration.” Benn, *supra* note 23, at 71 n.9; see also PERCY, *supra* note 15, at 95 (“The present argument does not require that triadic behavior be unique in man. Perhaps it is not. Semiotics proposes only that where triadic behavior occurs, certain new properties and relationships also come into existence.”).

¹⁷³ See *supra* note 133 and accompanying text; see also Thomas, *supra* note 133, at 544 (“There must be some reasonable chance of showing that the property bears on the forms of equal treatment that it is hoped, eventually, to defend.”).

¹⁷⁴ Jeremy Waldron explains the distinction between comparative and noncomparative rights as follows: “A noncomparative standard is one that entitles each person to some good or liberty by virtue of possessing some feature or characteristic With comparative principles, by contrast, what matters for a given person is the relation between what she gets and what others get.” Waldron, *supra* note 20, at 1356; see also Joel Feinberg, *Noncomparative Justice*, 83 PHIL. REV. 297 (1974).

¹⁷⁵ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 273–74 (1977) (“[I]ndividual rights to distinct liberties must be recognized only when the fundamental right to treatment as an equal can be shown to require these rights.”).

upright gait or the opposition of thumb and fingers justifies the rights bestowed upon persons by the Constitution.

For those who have considered the question, fundamental rights such as protection of the laws are indeed granted on the basis of that thing—alternatively called practical rationality, autonomy, moral agency, and so forth—which we have more accurately identified as the speech capacity that is the self.¹⁷⁶ The thrust of Part II above is that because speech is the essence of the human self, the right of free speech stands preeminent among fundamental rights in that it alone protects the very source and content of the self. Many other constitutional rights may be viewed in this context as playing a supporting part to that of the First Amendment; if their purpose lies at some remove from the actual source and substance of the self, they nonetheless safeguard the conditions most conducive to its flourishing. While the Supreme Court has recognized the connection between speech and the self only incompletely and inconsistently,¹⁷⁷ Laurence Tribe persuasively argues that the Court has generally understood fundamental rights as necessary to preserve the integrity of the self.¹⁷⁸ This understanding has been arrived at in piecemeal fashion, however.¹⁷⁹ For just as philosophers have struggled to give a name to the constitutive characteristic that forms the foundation of human equality, the parallel search within the law has also grasped at “[w]ords like ‘personhood,’

¹⁷⁶ See, e.g., Benn, *supra* note 23, at 65 (stating that “catalogs of natural and human rights are attempts to formulate” the ramifications of the descriptive equality of persons); see also Williams, *supra* note 133, at 112 (arguing that moral claims arise from common humanity).

¹⁷⁷ See *supra* notes 37–44 and accompanying text.

¹⁷⁸ Marshalling a wide range of the Court’s cases as well as legal scholarship, Tribe explicates a number of rights created by or derived from the Constitution. These include, under his own taxonomy, the liberty of conscience (comprising First Amendment freedoms of religion and speech), freedom of inquiry in the educational setting, freedom from governmental control of the consciousness, control over bodily integrity, and freedom to make a life plan. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 15-5 through 15-11 (2d ed. 1988).

¹⁷⁹ To make sense for constitutional law out of the smorgasbord of philosophy, sociology, religion and history upon which our understanding of humanity subsists, we must turn from absolute propositions and dichotomies so as to place each allegedly protected act, and each alleged illegitimate intrusion, in a social context related to the Constitution’s text and structure.

....

... But, after all is said and done, there is no escape, if the essence of personality is to be protected, from the attempt to define . . . wherein that essence lies.

'autonomy,' 'identity,' and 'dignity.'" ¹⁸⁰ Given their proper understanding, however, the fundamental rights of the Constitution have but "a single aim: preservation of 'those attributes of an individual which are irreducible in his selfhood.'" ¹⁸¹ On our understanding that the human self is in fact composed entirely of speech, ¹⁸² we may conclude that the speech capacity is both the ground of descriptive human equality and the determining factor in the allocation of fundamental rights, including "protection of the laws."

C. Social Equality and Speech

All that remains for this part of the argument is to make explicit what should by now be nearly self-evident: social equality cannot be advanced

¹⁸⁰ *Id.* § 15-2, at 1304. The difficulties have been just as great in the legal as in the philosophical setting:

Human beings are of course the intended beneficiaries of our constitutional scheme. . . . [Y]et [the Constitution] contains no discussion of the right to be a *human being*; no definition of a person; and, indeed, no express provisions guaranteeing to persons the right to carry on their lives protected from the "vicissitudes of the political process" by a zone of privacy or a right of personhood. Nor, apart from the obviously incomplete listing in the Bill of Rights, does the document enumerate those aspects of self which must be preserved and allowed to flourish if we are to promote the fullest development of human faculties

Id. § 15-3, at 1308 (citations omitted).

¹⁸¹ *Id.* § 15-1, at 1304 (quoting Freund, 52d ALI Ann. Mtg. 42-43 (1975)); see also *supra* note 175.

Others have come to similar conclusions, expanding the conventional notion of privacy rights to show that many fundamental rights are designed to protect the self. See, e.g., PENNOCK, *supra* note 142, at 84. Stanley Benn makes the point in terms that clearly echo Peirce's conception of the individual self's use of language, see *supra* notes 102-112:

I am suggesting that a general principle of privacy might be grounded on the more general principle of respect for persons. By a *person* I understand a subject with a consciousness of himself as an agent, one who is capable of having projects, and assessing his achievements in relation to them. To *conceive* someone as a person is to see him as actually or potentially a chooser, as one attempting to steer his own course through the world, adjusting his behavior as his apperception of the world changes, and correcting course as he perceives his errors.

Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, 13 [PRIVACY] NOMOS 1, 8-9 (J. Roland Pennock & John W. Chapman eds., 1971).

¹⁸² See *supra* notes 98-101 and accompanying text.

through infringements on speech. The preceding exposition of the Equal Protection Clause's prescriptive equality command permits us to map out fully its constituent syllogistic steps as follows:¹⁸³

- | | |
|------------------------|---|
| Normative Rule: | (1) Protection of the laws is to be granted to persons based on the possession of a self; |
| Descriptive Equality: | (2) All persons possess selves equally; |
| Prescriptive Equality: | (3) All persons have a right to equal protection of the laws. |

The self, as Peirce's explanation of the phenomenon demonstrates, is composed of the flow of speech, both internal and external, through the mind in a continuous inquiry aimed at harmonizing one's understanding of the world with its external reality.¹⁸⁴ Thus the self is constituted neither by any particular content in speech nor by any particular kind of speech. Rather, it is constituted by the capacity for speech and the freedom to make use of that capacity, "freedom to think as you will and to speak as you think,"¹⁸⁵ without regard to where the process may lead, for it is not the destination, but the process that gives life to the individual self.¹⁸⁶

Comprehending the relationships between the Equal Protection Clause and the self, on the one hand, and between the self and the freedom of speech, on the other hand, makes apparent the absurdity of trying to fulfill the prescription of the Clause by circumscribing speech rights. The only rationale for providing protection of the laws to people in the first instance is the normative decision that people are worthy of such protection because of their possession of selves. The self, in other words, has been independently judged to be a valuable thing, meriting various measures (including protection of the laws) designed to ensure its preservation. Reducing the freedom of speech—which necessarily means diminishing the potentiality of the human self—as a means of assuring that the protection of the laws is bestowed equally is to attempt to satisfy a derivative

¹⁸³ See *supra* note 133 and accompanying text.

¹⁸⁴ See *supra* notes 98–108 and accompanying text.

¹⁸⁵ *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., joined by Holmes, J., concurring); see also *supra* notes 37–39 and accompanying text.

¹⁸⁶ See *supra* notes 121–22 and accompanying text; see also David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974) (stating that "[f]reedom of expression permits and encourages" the use of "the central human capacity to create and express symbolic systems In so doing, it nurtures and sustains the self-respect of the mature person.").

principle by violating its constitutive principle.¹⁸⁷ The attempt, in short, is logically doomed to destroy the very thing it proposes to rescue.¹⁸⁸

It may be objected that by setting up the right of free speech as the prime protector of the self and, in turn, the self as the entity to which fundamental rights are dedicated, the present argument cannot but maintain that the First Amendment is, after all, an absolute. Otherwise (the criticism would presumably continue), any compromise of the absolutist position would reveal that, regardless of its connection to the self, the speech right is finally a contingent thing that should and indeed does give way when sufficiently weighty considerations are balanced against it. The objection is mistaken, however. The point here is not that the speech right as guardian of the human self is unassailable; the point is rather that the right *is* unassailable *when the assault is made for the purpose of promoting the integrity of the self*.

This is not equivalent to First Amendment absolutism. A proposed limit on speech might well be valid if it were based, not on a prescription derived from the value of the self, but instead on some distinct normative principle. In such a case, the contest would be between two independent values, and the decision could conceivably go either way.¹⁸⁹ But where restrictions on speech purport to foster a goal, the value of which itself derives from benefits of free speech, such restrictions will prove self-defeating in the deepest sense possible.

IV. THE SELF AND DEMOCRACY

A. *Conflicting Theories of the Self*

The discussion to this point suggests a theory of the individual self that explains the place it holds in our constitutional scheme of personal rights. In this scheme, the right of free speech is primary in that it protects the essence of

¹⁸⁷ See RAWLS, *supra* note 155, § 77, at 511 ("The priority of [the fundamental right to equal respect] over [a principle of equal distribution of goods] enables us to avoid balancing these conceptions of equality in an ad hoc manner . . ."); Dworkin, *Liberalism*, *supra* note 23, at 116–17 n.1, 125–26 (explaining the relationship between constitutive and derivative principles).

¹⁸⁸ See Vlastos, *supra* note 20, at 62–67 (arguing that under principles of equalitarian justice, "just distribution" necessarily means the equal distribution of benefits "at the highest obtainable level"); cf. RAWLS, *supra* note 155, § 11, at 60, § 46 at 302 (expounding the "difference principle").

¹⁸⁹ See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 175, at 277–78 ("The argument for any given specific liberty may . . . be entirely independent of the argument for any other, and there is no antecedent inconsistency or even implausibility in contending for one while disputing the other.").

the self, whereas other fundamental rights create a space that insulates that essence from incursions by the state.¹⁹⁰ Further, since the self is literally composed of speech and since the justification for social equality relies upon the value of the self, social equality cannot logically be sought through a diminution of the speech right. An acceptance of this much would put paid to the idea of outlawing certain speech on the ground that it contributes to the subordination of oppressed groups.

Yet the foregoing remains open to a potentially devastating criticism: even granting that the self is in fact the necessary foundation underlying the demand for social equality, the claim that the human self is composed of speech might be considered seriously incomplete because it ignores the threats to the self that also come in the form of speech. In other words, one might accept the syllogism arrived at in Part III, identifying the self as both the basis of descriptive human equality and the determining factor in the distribution of "protection of the laws," yet deny the identity asserted in Part II between the self and *freedom* of speech. The arguments of social equalitarian critics imply that hate speech, whatever dubious benefits it may have for the individual self who engages in it, unquestionably injures the selves of its targets. Thus, the self cannot be understood as intact merely by virtue of the speech capacity and the freedom to exercise it; it requires also to be free from the speech of other selves that would degrade it. The validity of this objection is best explored by focusing on the two sides of this aspect of the argument.

1. *Self-Realization Through Free Speech*

The explanation of the self outlined above in Part II contains an implicit rejection of the contention that speech expressing offensive ideas can be understood as threatening to the self. The self, an entity made up of nothing but language, becomes itself by means of an ongoing inquiry conducted through the medium of language, an inquiry in which the self both speaks and listens. The end of the inquiry is to reconcile the self's perceptions with the reality of the world and so be enabled to choose its future and its life plan.¹⁹¹ The forward-looking nature of the constantly evolving self depends upon the full use of its powers of inquiry—that is, speech—since the process of self-realization would be stunted if the choices to be made were predetermined and the information to be gathered as well as responded to were limited artificially by law rather than by the self's own imperfect powers.¹⁹² Each contraction of

¹⁹⁰ See *supra* notes 178–81 and accompanying text.

¹⁹¹ See *supra* notes 102–18 and accompanying text.

¹⁹² See *supra* text accompanying notes 121–22.

the circle of available speech to some degree reduces the potentiality of the self. And while any nonabsolutist view of the First Amendment accepts that some restrictions on speech and thus on the self must be allowed for other reasons, a desire for social equality cannot justify undermining the object that is the source of equality's worth.

The project of the self is an inquiry whose success turns on its access to and use of speech to harmonize its understanding with reality and so chart its future. This vision is plainly inconsistent with the notion that the ideas in some speech actually blunt the self's inquiry, or that some speech should be excised from the realm of possible speech merely because it convinces others to take one's self less seriously. If there is anything at all to the concept of the self's inquiry, it is that these challenged manifestations of speech, *because they represent the reality of other selves*, are part of the reality of the world and therefore are necessarily grist for the mill of the self.¹⁹³ Any effect that so-called hate speech has on an individual self is simply a part of the process of that self's realization.

Reaction to offensive speech may take many forms, and the reaction of any individual self is a function of that individual's autonomous will. Banishing hate speech would injure both speakers and listeners. First, by forbidding them the right to influence others through the assertion of their beliefs, it would deny the self-realization of speakers who wish to engage in such speech. This is not so distasteful a position as it may seem if one remembers that the value of self-realization is to be found not in the nature of the self that results from the process (however regrettable we may find that result) but in the ongoing process itself, since the ultimate end of that process necessarily remains unknown. But more to the point here, abolishing hate speech would also injure its recipients by denying their ability to comprehend the full nature of the world (again, unpleasant though this facet of it may be) and to adapt their views of the world and their responses to it, in the form of their life plans, accordingly. That is, when speakers are denied the right to express an idea, listeners are prevented from hearing it, evaluating it for themselves, and reacting to it—whether that reaction would take the form of embracing the idea, rejecting it, or investigating it further. Restricting speech means denying listeners access to ideas on the ground that those who hear them will not react properly; this is a paternalism entirely inconsistent with the notion of the autonomous self.

¹⁹³ See *supra* note 113 and accompanying text.

2. *Self-Realization Realization Through Censorship of Hate Speech*

If self-realization occurs through speech, the counterpart to the above argument might go, so do many harms inflicted upon the self. Social equalitarians could agree that the self is the key value behind their drive for social equality, but deny that there is a total identity between freedom of speech and self-realization. A group of arguments that they have put forward indicates that equalitarians would contend that speech as a component of the self must be supplemented by a measure of legal security from the hurtful speech of others, since such speech weakens the selves of its victims. These arguments, generally known under the rubric of "silencing," actually comprise several different notions. Robert Post has helpfully sorted them into three categories: "[V]ictim groups are silenced because their perspectives are systematically excluded from the dominant discourse; victim groups are silenced because the pervasive stigma of racism systematically undermines and devalues their speech; and victim groups are silenced because the visceral [reaction induced by] racist speech systematically preempts response."¹⁹⁴

We can thus understand these types of arguments to include within their compass not only harms done to individuals but also to groups by the destruction of social structures that foster group identities.¹⁹⁵ The silencing arguments posit that hate speech is different from other speech that might be merely offensive; hate speech is not useful to the self, but rather it in some sense disables the self, short circuiting the self-realization process. In essence, these arguments seek to show that at least some of the rights that have been identified herein as secondary to the speech right¹⁹⁶ are in fact at least coequal with it and therefore may be legitimately balanced against it.¹⁹⁷ For instance, rights against defamation, invasion of privacy, and intentional infliction of emotional distress are clearly of the kind that serve to safeguard the integrity of

¹⁹⁴ Post, *Free Speech*, *supra* note 13, at 306 (citations omitted). For the detailed framing of these arguments, see MACKINNON, *supra* note 3, at 77-78; CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 206 (1989); SUNSTEIN, *supra* note 8, at 219-20; Richard Delgado, *Campus Anti-Racism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991); Lawrence, *If He Hollers*, *supra* note 7, at 68-69; Matsuda, *supra* note 31, at 24-26.

¹⁹⁵ In addition to the sources cited in note 194 *supra*, see also Delgado, *supra* note 6, at 93-96. These arguments are summarized and receive their fullest explication in Post, *Constitutional Concept*, *supra* note 13.

¹⁹⁶ See *supra* text at note 190; see also *supra* notes 178-81 and accompanying text.

¹⁹⁷ See Post, *Democratic Community*, *supra* note 13, at 168-69 and sources cited therein; see also PENNOCK, *supra* note 142, at 91 ("Collectivists hold that man needs society to develop his full potentialities . . . and even to enable him to become fully autonomous.").

the self.¹⁹⁸ But while the present argument would place such rights below the right of free speech, limiting their applicability to instances in which the speaker knowingly used false facts to injure someone,¹⁹⁹ social equalitarians would presumably put rights against group defamation and the like on something close to equal footing with the speech right, if not actually reverse these rankings.²⁰⁰ In any case, the equalitarian analysis would clearly lead to restricting hate speech on the ground that it harms the selves of its targets much more than it contributes (if it does so at all) to the self-realization of its speakers.

Social equalitarians might argue that if the justification for allowing hurtful speech is, from the perspective of its victim, the opportunity to know the complete reality of the world, then the justification is insufficient. No one would pretend to believe that an individual's ability to grasp the nature of reality is a perfect one. Indeed, Peirce's theory admits as much.²⁰¹ Moreover, it is simply untenable to maintain that lack of "knowledge of the reality" of hateful speech will dull the self's inquiry appreciably: the reality of racism and sexism is far too apparent as it is. Restricting hate speech will remove from the purview of its victims only that language with a capacity to degrade them that infinitely exceeds its instructive qualities, such as they are. The impossibility of attaining perfect knowledge of the world also counsels against recognizing any significant self-realization rights of sponsors of hate speech. The self's freedom to inquire of reality and chart its moral course thereby is so restricted by human limitations that the state cannot be denied the power to prohibit extreme speech that seriously inhibits its targets' selves from engaging in any self-realizing inquiry at all.

In the end, the debate on this level boils down to one issue. On the one hand, whether hate speech is to be protected because, as part of the realm of possible expressions of beliefs and ideas, it must be available to speakers and listeners engaged in the process of self-realization. Or, on the other hand, whether such speech should be forbidden entry into public discourse based on its capacities to harm those individuals and groups who are its subjects. To the

¹⁹⁸ See *TRIBE*, *supra* note 178, §§ 15–16; Post, *Democratic Community*, *supra* note 13, at 168–69.

¹⁹⁹ To be precise, the standard recommended here is that of "actual malice" adopted by the Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254, 279–83 (1964) (statements made with knowledge of their falsity or with reckless disregard of the truth). Ronald Dworkin has suggested that this standard be adopted for all defamation suits. See Dworkin, *supra* note 29, at 63.

²⁰⁰ See Delgado, *supra* note 6, at 97–100 (basing tort of racial insult on analogy with defamation and intentional infliction of emotional distress).

²⁰¹ See *supra* text at note 109.

degree that the theory of individual self-realization claims to provide not just doubts about the equalitarians' rationales, but also a positive basis for rejecting them, it must stand or fall based on the knowledge-gathering process as part of self-realization, something that the equalitarian arguments dismiss as outweighed by the injuries inflicted on the self by racist and sexist speech. At the worst for the present argument, the debate portrayed thus far might be a draw, called for lack of empirical evidence on either side.

Yet the theory of individual self-realization can enlist the aid of another argument, the one that in fact has most often been made against hate speech censorship, the argument from the principle of democratic self-rule. This argument, for its part, has been seen as at least arguably vulnerable to the equalitarian critique on other grounds; however, by drawing out the relationship between democratic theory and the theory of self-realization—a connection that has been too little noted and is in fact derivable from the larger architectonic philosophy of Charles Peirce—it becomes clear that the two principles in their natural combination foreclose the possibility that restrictions on the ideas in speech could ever serve social equality.

B. *The Response of Democratic Theory*

In their own rejections of hate speech censorship, commentators approaching the issue from the perspective of democratic theory have pointed to the inconsistency of such action with basic principles of that theory as embodied in the Constitution.²⁰² Within classical democratic theory, free speech is the corollary to equal voting rights. Democracy, based as it is on the fundamental principle of self-rule, holds that people are bound to abide by the decisions of the majority because they retain the right to try to change those decisions through their speech.²⁰³ The Constitution adopts a governing process

²⁰² The self-realization rationale for seeing the speech right as preeminent among fundamental rights, *see supra* notes 176–82 and accompanying text, has a well-recognized counterpart in democratic theory, *see, e.g.*, Post, *Meiklejohn's Mistake*, *supra* note 13, at 1123 (“The ideal of autonomy essentially distinguishes First Amendment jurisprudence from other areas of constitutional law, which are most often associated with specific visions of collective identity.”); Anthony Lewis, *The First Amendment, Under Fire from the Left*, N.Y. TIMES, March 13, 1994, at § 6, at 42 (quoting Justice Hugo Black’s statement that “[f]irst in the catalogue of human liberties essential to the life and growth of a government of, for and by the people are those liberties written into the First Amendment to our Constitution”).

²⁰³ *See, e.g.*, Massey, *supra* note 8, at 116–22; Post, *Between Democracy and Community*, *supra* note 13, at 170–71; Post, *Free Speech*, *supra* note 13, at 280–84; Post, *Meiklejohn's Mistake*, *supra* note 13, at 1123; Martin H. Redish & Gary Lippman,

grounded in autonomy rather than heteronomy, the former defining itself as one "in which the laws are made by the same people to whom they apply" and the latter as one in which "the law-makers are different from those to whom the laws are addressed."²⁰⁴ Post explains that restricting speech to achieve social equality implicitly suggests that the Equal Protection Clause may, by some "Ultimate Interpreter," be placed outside the reach of the "collective will" of the people by forbidding discussion that might question the provision's wisdom or even the interpretation that some would give it.²⁰⁵ "Our government," Post says plainly, "currently contains no such Interpreter, not even the Supreme Court, whose constitutional decisions are always shadowed by the potential of constitutional amendment or political reconstruction through subsequent appointments."²⁰⁶

By this account, democracy as taken up by the Constitution requires freedom of speech within the realm of public discourse most often referred to as the marketplace of ideas.²⁰⁷ Political equality, it is argued, trumps social equality in the case of a conflict. The point is sharply drawn by Ronald Dworkin:

The most fundamental egalitarian command of the Constitution is for equality through the political process. We can imagine some compromises of political equality that would plainly aid disadvantaged groups—it would undoubtedly aid blacks and women, for example, if citizens who have repeatedly expressed racist or sexist or bigoted views were denied the vote altogether. That would be unconstitutional, of course²⁰⁸

The notion that any idea that offended someone sufficiently could stand as an adequate reason to expel that idea from public discourse "would leave first amendment values in shambles."²⁰⁹ And it is in the realm of public discourse that First Amendment values are most closely allied with democratic processes, since recognizing a veto of speech based on the offensive tastes it conveys

Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications, 79 CAL. L. REV. 267, 273–81 (1991).

²⁰⁴ NORBERTO BOBBIO, *DEMOCRACY AND DICTATORSHIP* 137 (Peter Kennealy trans., 1989), quoted in Post, *Free Speech*, *supra* note 13, at 280; see also Massey, *supra* note 8, at 117.

²⁰⁵ Post, *Free Speech*, *supra* note 13, at 293.

²⁰⁶ *Id.*; see also Post, *Meiklejohn's Mistake*, *supra* note 13, at 1116.

²⁰⁷ See Post, *Free Speech*, *supra* note 13, at 282–83 (citing support for this view in the works of Benjamin Barber, John Dewey, Emile Durkheim, Claude Lefort, Jürgen Habermas, John Rawls, and Frank Michelman).

²⁰⁸ Dworkin, *supra* note 4, at 41.

²⁰⁹ TRIBE, *supra* note 178, § 15-18, at 1410.

"would mean denying that some people—those whose tastes these are—have any right to participate in forming the moral environment at all."²¹⁰

To describe the effects of hate speech on its targets as "silencing" is to misunderstand the nature of the self's reaction to speech.²¹¹ In the same way that the democratic system allows for no figure of authority, independent of what the people decide through public discussion, that is sanctioned to set particular issues beyond debate, it similarly lacks any means of deciding that some people are not speaking enough or that others are not taking adequate notice of them.²¹² If the case for censoring speech turned on that speech's tendency to persuade people to take one less seriously or to cause one to doubt one's self or one's own beliefs, the inquiries and disagreements allowed between individuals engaged in self-governance would surely be reduced to only innocuous trivialities, since "[e]very powerful and controversial idea has a potential negative impact on someone's self-esteem."²¹³

The attempt to distinguish racist and sexist speech from other types of offensive speech can only be based on the strength of the emotions it creates in its critics, something less than an objective barometer of what kinds of speech must be suppressed. This seems an important consideration when one considers that everyone—including both pro-choice and anti-abortion activists, white supremacists, socialists, and any other group the imagination can conjure—would doubtless have their own candidate for suppression. As Post suggests, in such a situation, "the issue can be resolved only through the exercise of naked

²¹⁰ Dworkin, *supra* note 4, at 41.

²¹¹ Henry Louis Gates, Jr. ridicules the notion of hate speech causing "silencing." Responding to the silencing arguments and the remedy of allowing victims of hate speech to "name[] the injury and identify its origins," he remarks:

This sounds, of course, like a popular primer on how psychotherapy is supposed to work; with a few changes, the passage might be addressed to survivors of toxic parenting. Indeed, "alexathymia"—the inability to name and articulate one's feelings—is a faddish diagnosis in psychiatry these days. Nor is critical race theory's affinity with the booming recovery industry a matter of chance. These days the recovery movement is perhaps the principal source of resistance to the older and much-beleaguered American tradition of individualism.

Henry L. Gates, Jr., *Let Them Talk*, NEW REPUBLIC, Sept. 20 & 27, 1993, at 37, 46 (reviewing MATSUDA ET AL., *supra* note 6).

²¹² See, e.g., Post, *Free Speech*, *supra* note 13, at 306–10 (arguing that it is impossible to distinguish the results from alleged "silencing" from the results of what the marketplace of ideas is supposed to do).

²¹³ Dworkin, *supra* note 29, at 61; see also Post, *Free Speech*, *supra* note 13, at 307–08.

group power, a solution not at all advantageous to the marginalized and oppressed.”²¹⁴ Once this is understood, it becomes clear that to “solve” the amorphous effects attributed to silencing through government enforced censorship is merely to replace self-rule with an unrestrained majoritarianism, one that makes the questionable assumption that the majority will always be on the side of social equality.²¹⁵ Perhaps all that need be said for this conclusion in the face of dissatisfaction with the present system’s apparent flaws is that “[t]he critical question is not how well truth will advance absolutely in conditions of freedom but how well it will advance in conditions of freedom compared with some alternative set of conditions.”²¹⁶ In this sense, democracy, through the speech right, endorses a particularly fundamental notion of equality.²¹⁷ Allowing censorship of particular ideas is to reject democracy.²¹⁸

The equalitarians’ answer to this picture of classical democratic theory is to suggest that however true it may be with regard to the lion’s share of issues that a democracy faces, social equality is an interest of an altogether higher order than other issues. Setting the question of social equality beyond the vicissitudes of the democratic decisionmaking process carried out through

²¹⁴ Post, *Free Speech*, *supra* note 13, at 309; *see also* Massey, *supra* note 8, at 168.

²¹⁵ *See* Redish & Lippman, *supra* note 203, at 279–80 (explaining how free speech as a part of democracy provides the system with a Rawlsian “bet-hedging” check, since “[i]f popular sovereignty is not required to legitimate political choices on a moral level, then any political decision could be taken and legitimated solely by means of having the power to enforce it”).

²¹⁶ Greenawalt, *supra* note 56, at 135; *see also* Redish & Lippman, *supra* note 203, at 278 (“The question the critics of classical democracy need to answer, however, is exactly what the preferable alternative system is.”).

²¹⁷ The Supreme Court has likewise made this point:

To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought free from government censorship. . . .

There is an “equality of status in the field of ideas,” and government must afford all points of view an equal opportunity to be heard.

Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 95–96 (1972) (quoting ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1948)); *see also* HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 287–88 (Anders Wedberg trans., 2d ed. 1961); Karst, *supra* note 14, at 52–59.

²¹⁸ *See* Redish & Lippman, *supra* note 203, at 276 (“Since a belief in societal self-determination underlies our entire political system and constitutional structure, . . . we cannot reject that belief without simultaneously rejecting the American form of government.”); *see also* Post, *Free Speech*, *supra* note 13, at 283–85.

speech is not a circumvention of democracy, but rather a definition of it in light of the Fourteenth Amendment, one that properly includes social equality as an essential part of the process's baseline.²¹⁹ The marketplace of public discourse is thus taken to be per se ineffective and illegitimate until social equality has been achieved. Allegations of the silencing of minorities and women by racist and sexist speech form a version of the argument, often made in other contexts of the debate over speech and equality, that the marketplace of ideas has experienced a market failure.²²⁰ Because the speech of these oppressed groups is silenced, hate speech holds much more sway than would be the case in a well-functioning arena of public discourse: the market is skewed and requires governmental intervention in the form of penalties for hate speech for its correction.²²¹

But the equalitarian argument goes further than mandating a one-time correction of a "process defect" that would then allow re-opening the marketplace of speech to all views on issues that might affect social equality. Permitting the expression of any conceivably anti-equality ideas, even after effecting a market correction, would breach the precondition of social equality that is taken as necessary to the marketplace to begin with.²²² The argument, in brief, is that democratic decisions on the overwhelmingly important question of

²¹⁹ See, e.g., sources cited *supra* note 7.

²²⁰ See *supra* notes 194–95 and accompanying text. Charles Lawrence addresses the marketplace notion in this context at some length. See Lawrence, *If He Hollers*, *supra* note 7, at 77–79. For general critiques of the concept of the "marketplace of ideas," see Baker, *supra* note 35, at 974–79; Ingber, *supra* note 56; Lawrence B. Solum, *Freedom of Communicative Action: A Theory of First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 69–71 (1989); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1141–63 (1993).

²²¹ Catharine MacKinnon sums up many of the strands in this argument:

It seems to me that the lack of access to speech by those with dissident views—views not allowed to be expressed in the media, by a publishing world that excludes these, as well as by systematic forms of exclusion like lousy educational systems that promote illiteracy—are all forms of trouble for the First Amendment.

Lewis, *supra* note 202, at 42 (remarks of Catharine MacKinnon); see also Post, *Meiklejohn's Mistake*, *supra* note 13, at 1124–25 (summarizing the position of Sunstein and other collectivists).

²²² [T]he idea of the racial inferiority of non-whites infects, skews, and disables the operation of the market (like a computer virus, sick cattle, or diseased wheat). It trumps good ideas that contend with it in the market. It is an epidemic the marketplace of ideas and renders it dysfunctional.

Lawrence, *If He Hollers*, *supra* note 7, at 77.

social equality must be suspended. If rejecting free speech means rejecting the classical conception of democracy as it applies to this issue,²²³ so be it. The Constitution, equalitarians contend, has already suspended democracy in this sense, through the Equal Protection Clause, by “mandat[ing] the disestablishment of the ideology of racism.”²²⁴ The Fourteenth Amendment is said to provide the basis for limiting this encroachment on speech to a single issue.

It is hard to know how to understand this argument other than as an assertion that the Equal Protection Clause authorizes thought control. If the Equal Protection Clause mandates the disestablishment of racist ideology, does this mean that the Clause is insulated or immune somehow from attempts, based on racist beliefs, to repeal the Fourteenth Amendment? And if so, are all constitutional provisions likewise insulated on the ground that, whatever purpose they serve, they similarly require the elimination of all speech expressing beliefs set against their purposes? Or, if suspension of the First Amendment is required only in the context of this one provision of the Constitution, on what can such a limitation be based other than the political beliefs of those proposing the suspension? Such a picture does not differ in any principled way from a scenario in which anti-abortion forces first succeed in passing a constitutional amendment to the effect that human life begins at conception and then outlawing any speech that—perhaps by silencing and deeply offending those who oppose abortion—might tend to undermine the constitutional commitment to life.

The equalitarian argument is simply unresponsive to the point that *all* governmental restraints on freedom—including those made in the name of

²²³ See *supra* notes 207–18 and accompanying text.

²²⁴ Lawrence, *Introduction*, *supra* note 7, at 15. The full sentence reads as follows: “The [F]irst [A]mendment is employed to trump or nullify the only substantive meaning of the [E]qual [P]rotection [C]lause, that the Constitution mandates the disestablishment of the ideology of racism.” *Id.* Catharine MacKinnon makes much the same point in advancing her justification for regulating “racial harassment, pornography and hate propaganda”:

At the very least, when equality is taken seriously in expressive settings, [hate speech is] not constitutionally insulated from regulation on the ground that the ideas they express cannot be regarded as false. Attempts to address them would not be prohibited . . . on the ground that, in taking a position in favor of equality, such attempts assume that the idea of human equality is true. The legal equality guarantee has already decided that.

MACKINNON, *supra* note 3, at 106–07. “At the very least,” in other words, the Equal Protection Clause allows the State to restrict hate speech because the ideas it expresses are false.

equality—preserve their legitimacy only by remaining open to question through free speech and subsequent changes through the political process. The Equal Protection Clause contains nothing that could make it an exception to this fundamental democratic principle. To the degree that equalitarian proposals rely upon a logically illimitable rejection of fundamental tenets of democracy (without legitimating such an action through amendment of the Constitution²²⁵), the argument from democracy for maintaining undiminished speech rights in this context is unassailable, barring a wholesale abandonment of democracy itself.

No doubt the persistence of proposals to censor hate speech and the influence they continue to exercise²²⁶ is attributable to the powerful appeal of the call for an end to racism and sexism. This appeal is especially notable given that democratic theory's opposition to that call offers as an alternative what might seem to be the comparatively bloodless ideal of government neutrality. If democracy as a system of governance has no end beyond itself and no substantive vision besides its commitment to self-rule, then it requires allowing speech that most of us find anathema. This conclusion proves to be a particularly bitter one in the context of issues as emotionally compelling as racism and sexism. For some, it justifies a reconceptualization of democracy, although the discussion above establishes that this conclusion can end only in a denial of democracy.

Whether or not social equalitarians are seriously prepared to abandon the democratic process to advance their goals, the repugnance of hate speech for all of the participants in this debate, together with the imperfections of the democratic process that are admitted by its most determined defenders,²²⁷ suggests the importance of identifying the nature of the moral force behind democracy's defense of the freedom of speech against incursions in the name of social equality. The preceding discussion makes clear that, as a descriptive matter, the Constitution logically requires the political equality guaranteed by free speech as part of the governing process. But in the interest of revealing the error in the selective modification of democratic principles, it is also useful to understand what would be lost were such attempts to succeed. That is, how can

²²⁵ In light of the argument that the Equal Protection Clause's command of social equality also peremptorily forbids any effort to repeal it, it is reasonable to ask whether the Constitution's provisions that allow for its own amendment similarly forbid efforts to repeal *them*. It looks as if the paradox is, at least, a complete one.

²²⁶ Indeed, they have proved compelling enough to have had enormous influence among the general population, universities, state legislatures, and other countries. See Post, *Free Speech*, *supra* note 13, at 267–70; Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1114–27 (1993).

²²⁷ See *supra* note 216 and accompanying text.

we say that the political equality demanded by democracy is, as a normative matter, more valuable than the elimination of the undeniable pain caused by hate speech? What does the protection of this speech contribute to our society that outweighs that pain? There is an answer to these questions, and it exists as a piece of the theory of the self enunciated in Part III above. If an integrated and complete picture of the relationship between speech and both the individual self and the self of the polity as created by democracy can explain definitively why suppression of even hate speech injures rather than aids the self, then the syllogistic conclusion of Part III above—that the desirability of social equality cannot logically justify limitations on speech—will prove validated.

C. Democracy as Self-Realization

This Part, so far, has been concerned with defending the conclusion of Parts II and III that social equality cannot be achieved through restrictions on hate speech. The model of individual self-realization strongly suggests this conclusion, yet it may nonetheless be vulnerable to equalitarian arguments, for it depicts the value of speech as deriving from the self's inquiry into the nature of reality, which because of the limitations of the individual can never be complete. The argument from social equality maintains that the Fourteenth Amendment properly constitutionalizes our nation's commitment to equality based on communal knowledge painfully acquired over decades of racial strife and thus removes decisions on such matters, even as manifested in speech, from the control of the imperfect individual. In answer to this, democratic theory provides what is often portrayed as a discrete basis for denying such an interpretation of the Equal Protection Clause. By forbidding restrictions on the expression of ideas, the rule of this model takes open public discourse to be essential to the power of the government over its citizens. Yet equalitarians contend that our understanding of what democracy requires should be emended if it can provide no convincing instrumental justification for tolerating the evils of oppression of subordinated groups.

There is, however, a way of understanding democracy's insistence on self-rule as a dedication to something more than undirected majoritarian choice in which the minority's contribution to the process is ended once the choice is made. Further, this understanding of the theory behind democracy demonstrates a mutually supporting basis between it and the model of individual self-realization. Correctly understood, the two theories are knit together in a way that establishes the ultimate failure of the argument for censoring speech as a means of attaining social equality.

The argument outlined in the preceding section explains that democracy reserves the power of government—including the right to speak in favor of

unpopular positions—to all citizens based on the centrality of the autonomous individual to our system of personal rights,²²⁸ a principle presumably not in doubt even among social equalitarians. Thus all would agree that an action of the government is valid only insofar as all competent citizens had the right to participate (whether directly or indirectly) in the decision to take the action. That right of participation, we should also be able to agree, extends not only to voting but also to speech on the question to be decided. The argument for restricting hate speech departs from classical democratic theory in its view of the role of speech upon an issue already decided by this participatory system. For equalitarians, once the decision has been made, the value of speech protesting that decision and urging its reversal is enormously vitiated, if not exhausted altogether. The enactment of the Fourteenth Amendment, on this view, closes the question of the propriety of social equality.²²⁹ Democratic theory, however, does not envision our system as one in which issues are serially laid to rest for perpetuity by means of a single vote, even one that takes place after a full airing of all views. Rather, it contemplates self-government as an ongoing process in which the democratic community lives as an organic entity capable of reconstituting itself over time.²³⁰

Therein lies the vital connection between individual self-realization and democracy, a connection that Peirce's thought can illuminate. Part II above explained that speech supplies the key to individual self-realization by allowing the individual self to explore the nature of the external world, continually modifying its beliefs through an internal dialogue with itself as that exploration continues, and, based upon its beliefs at any given moment, to assert itself through choosing its life plan. But this process is not confined to the internal evolution of the individual self: it is replicated *among* the selves that form a community. As Peirce put it:

[M]an's circle of society . . . is a sort of loosely compacted person, in some respects of higher rank than the person of an individual organism. It is [this fact, combined with the evolving conversation that is the individual] that

²²⁸ See Post, *Free Speech*, *supra* note 13, at 285; Redish & Lippman, *supra* note 203, at 274.

²²⁹ See *supra* note 224 and accompanying text.

²³⁰ See Redish & Lippman, *supra* note 203 at 276–77 (“Numerous well-established philosophical arguments that justify our democratic system reflect the societal commitment to self-determination.”); see also Post, *Meiklejohn's Mistake*, *supra* note 13, at 1128 (“Public discourse merits unique constitutional protection because it is the process through which the democratic ‘self,’ the agent of self-government, is itself constituted through the reconciliation of individual and collective autonomy.”).

render[s] it possible for you—but only in an abstract, and in a Pickwickian sense—to distinguish between absolute truth and what you do not doubt.²³¹

The communal inquiry aimed at comprehending external reality is simply the aggregation of the inquiries conducted by the individual members of the community. Like the individual, the society seeks to stabilize its beliefs as a means to knowing the world and so determining how best to live in that world.²³²

For the community, as for the individual, the realization of its self depends upon this process and requires that it not be closed off or predetermined by external authority. What Peirce said about the individual's path to realization through speech applies with equal force to the self of the polity: "Were the ends of a person already explicit [and antecedently fixed], there would be no room for development, for growth, for life; and consequently there would be no personality."²³³ The self that exists by virtue of the speech capacity and evolves through the use of that capacity is the self capable of moral autonomy; it is governed not by animal instinct but rather by the power to know the world as an animal cannot and to make choices based upon that knowledge. While individual selves each possess their own autonomous wills, they are bound together in the same world and conduct their inquiries amongst each other so as to create a community of understanding.²³⁴

Thus, democracy as societal self-realization is bottomed on the belief that the self of the polity fulfills its potential through the exercise of its collective free will, a process that is distinguished from and superior to authoritarianism because it insists on the ability of the community to use its reason, borne of speech, as a means of learning and so achieving agreement. The authoritarianism that the social equalitarian program implicitly endorses necessarily denies the significance of inquiry and reason for the process of decisionmaking: it allows a majority, not only to restrict the freedom of all for no better reason than to do so is the majority's will, but also to forbid contrary

²³¹ Peirce, *supra* note 115, at 91; see also *supra* note 118 and accompanying text.

²³² See *supra* notes 102–18 and accompanying text.

²³³ 6 PEIRCE, *supra* note 75, ¶ 157, quoted in COLAPIETRO, *supra* note 17, at 77 (editorial insertion in COLAPIETRO). Redish and Lippman make a similar point:

The "freedom" of society to select only the moral choices some external source has already made . . . is no freedom at all; it would be a "democratic" system only in the same hollow and Orwellian sense that any totalitarian government holds "elections" with only the government's candidates running can be considered democratic.

Redish & Lippman, *supra* note 203, at 279.

²³⁴ See *supra* notes 113–18 and accompanying text.

speech in the belief that to allow debate would endanger the security of the majority's decision. But speech can be regarded as a threat instead of an aid to decisionmaking only if one repudiates the error-correcting value of speech on the ground that one's beliefs and decisions are infallible.

In contrast, democracy embraces the notion of epistemological humility, a principle that commits us to searching for agreement based on knowledge while demanding vigilance against the arrogant belief that we have ever found ultimate truth and therefore can afford to abandon the search. As Peirce put it:

Who would have said, a few years ago, that we could ever know of what substances stars are made whose light may have been longer in reaching us than the human race has existed? Who can be sure of what we shall not know in a few hundred years? Who can guess what would be the result of continuing the pursuit of science for ten thousand years, with the activity of the last hundred?²³⁵

But while Peirce maintained that "it is unphilosophical to suppose that, with regard to any given question (which has any clear meaning), investigation would not bring forth a solution of it, *if it were carried far enough*,"²³⁶ he also insisted that "I will not . . . admit that we know anything whatever with *absolute certainty*."²³⁷ In other words, knowledge is attainable, but we can never be so sure that we have attained it that we can afford to stop investigating our doubts.

It was seen above that because no single person can expect to reconcile her beliefs perfectly to the reality of the external world, the theory of individual self-realization arguably remained susceptible to the equalitarian argument for restricting speech as a means of protecting the self. Yet although the individual self's process of realization can never achieve its ideal, it does progress towards the ideal as it acquires measures of knowledge through adapting its beliefs as it experiences the reality of the world.²³⁸ Further, individual efforts to grasp truth do not benefit individuals alone, for the fruits of these efforts come together in a communal inquiry. This is the vision to which democracy is committed: A

²³⁵ Charles S. Peirce, *How To Make Our Ideas Clear*, POPULAR SCIENCE MONTHLY, Jan. 1878, at 293, reprinted in THE ESSENTIAL PEIRCE, *supra* note 1, at 124, 140.

²³⁶ *Id.* (emphasis added).

²³⁷ 7 PEIRCE, *supra* note 75, ¶ 108; see also Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433, 1443-44 (1990) (giving numerous examples of mistaken belief in certainty of scientific belief); Redish & Lippman, *supra* note 203, at 281-82 (illustrating the links among respect for self-determination, epistemological humility with regard to speech, and the democratic process).

²³⁸ See *supra* notes 102-12 and accompanying text.

community of persons, acting individually and together simultaneously, constantly developing and refining its conception of the good life—*i.e.*, governing itself—based upon the continuous search for knowledge. The process of inquiry carried out through speech leads to the realization of our individual and communal selves by bringing us closer to complete knowledge of the world and thus increasing our grounds for agreement about how we should live. Yet because we can never know when we have achieved such knowledge, we cannot decide that the truth about any particular issue has been so clearly established as to eliminate the need to consider the views of those who disagree or who might disagree in the future.²³⁹

What remains of this Part will be devoted to a close reading of a key text in First Amendment jurisprudence as a way of examining these propositions about the epistemology of democracy. If, as has been suggested, they reflect the basis of our constitutional democracy, then the reading of the Equal Protection Clause propounded by social equalitarians cannot be correct. Moreover, if these propositions command assent on their own intellectual merits, then any attempt to legitimate such a reading by amending either our understanding of the Constitution or the Constitution's text itself, is at best a misguided effort and at worst a grave danger to the future of the human self.

Equalitarians, in criticizing the justification of free speech supported by democratic theory, have pointed to what even they usually admit is one of the most powerful statements of the First Amendment's purpose to be found in the

²³⁹ Even Stanley Fish allows that such a conception is at least an honest possible alternative to his vision of First Amendment defenders as secret promoters of a hidden political agenda:

My mistake, one could argue, is to equate the something in whose service speech is with some locally espoused value (e.g., the end of racism, the empowerment of disadvantaged minorities), whereas in fact we should think of that something as a now-inchoate shape that will be given firm lines only by time's pencil.

FISH, *supra* note 57, at 109. Yet he simply cannot bring himself to believe in the value of tolerating painful speech "for the sake of a future whose emergence we can only take on faith." *Id.* To Fish, "[i]t is by no means clear that history's trajectory is benign." Fish, *supra* note 57, at 1077. With little more than this cursory consideration of the self-realization value of speech, Fish chooses to regard it as more likely being a "strateg[y] designed to delegitimize the complaints of victimized groups." FISH, *supra* note 57, at 110. Pierce Schlag provides a witty analysis of Fish's true project in an article that simultaneously celebrates and debunks that project. See Pierre Schlag, *How To Do Things with the First Amendment*, 64 U. COLO. L. REV. 1095 (1993).

United States Reports.²⁴⁰ In dissenting from the Supreme Court's decision in *Abrams v. United States*,²⁴¹ Justice Holmes acknowledged the temptation to censor speech likely to lead to consequences one abhors. "But," he continued,

when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.²⁴²

Cass Sunstein, for instance, has characterized Holmes's figure of the marketplace of ideas as expounding the unseemly ideology of "modern interest-group pluralism . . . [in which] politics consists of the outcomes of struggles for power among self-interested groups."²⁴³ He contrasts this view with another opinion, briefly considered above in Part II,²⁴⁴ Justice Brandeis's concurrence in *Whitney v. California*.²⁴⁵ In *Whitney*, Brandeis asserted that "[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties"²⁴⁶ Sunstein says that, "[i]n place of Holmes' hard-headed skepticism, Brandeis offers an exceedingly optimistic, even romantic account of the contribution of political deliberation to both democratic government and the development of human faculties."²⁴⁷ He further suggests that although the differences between the two Justices' perspectives were irrelevant in *Whitney* and *Abrams*, cases concerning government suppression of political dissent, Brandeis would have understood the failings of the marketplace model in the context of social inequality, while Holmes would not.²⁴⁸

Sunstein's critique of the marketplace of ideas plays upon a version of that concept in which the marketplace for speech has no instrumental justification

²⁴⁰ See, e.g., MACKINNON, *supra* note 3, at 71 & n.1; SUNSTEIN, *supra* note 8, at 24–28.

²⁴¹ 250 U.S. 616 (1919).

²⁴² *Id.* at 630 (Holmes, J., joined by Brandeis, J., dissenting).

²⁴³ SUNSTEIN, *supra* note 8, at 27.

²⁴⁴ See *supra* text at note 37.

²⁴⁵ 274 U.S. 357 (1927).

²⁴⁶ *Id.* at 372 (Brandeis, J., joined by Holmes, J., concurring).

²⁴⁷ SUNSTEIN, *supra* note 8, at 27.

²⁴⁸ *Id.* at 28.

independent of serving as a mechanism for implementing the decisions of the majority. When interpreted this way, Holmes's invocation of the marketplace as a way of finding truth defines truth not as objective reality, but rather only as "political truth," *i.e.*, whatever the more politically powerful segment of the polity decides is "true."²⁴⁹ If this is indeed what Holmes meant—or if this is the way we choose to understand him—then the problem, as Sunstein sees it, is that free speech might be perverted to serve the powerful in enforcing unethical ends. For if unrestricted public discourse is nothing more than a means to facilitate the brutish will of the majority, and, further, if one posits an infallible (external) authority instructing us that opposition to social equality is normatively and empirically wrong, then it seems clear that social equality *should* be incorporated into the premises of democratic theory.²⁵⁰ Barring the fulfillment of those preconditions, however, Sunstein cannot meet his burden.

Holmes's *Abrams* dissent is the appropriate text for evaluating democracy's response to the equalitarians. But its real import is not as Sunstein and others have characterized it. The most useful meaning of Holmes's statement that the marketplace produces truth is that open public discourse will in fact lead to the discovery of objective reality. So understood, the notion of the marketplace of ideas supplies democratic theory with a foundation that goes beyond exalting the popular will wherever it may lead: with the promise of the discovery of truth, self-rule means that the polity's choices about how to direct its future will be based upon a continuing investigation aimed at producing knowledge of all of the facts relevant to its decisions. Moreover, reading Holmes's opinion in this way makes it possible to see the interdependence of democracy and individual self-realization. These conclusions are supported by the fact that Charles Peirce's system of philosophy underlies not only the speech-based theory of individual self-realization, but also Justice Holmes's conception of the function of speech within a democracy.

The seemingly obligatory footnote to Holmes's discussion of the marketplace of ideas explains the debt that Holmes's thinking owes to the

²⁴⁹ See SUNSTEIN, *supra* note 8, at 27; see also Frederick Schauer, *Free Speech and the Argument from Democracy*, 25 [LIBERAL DEMOCRACY] NOMOS 241, 247 (J. Roland Pennock & John W. Chapman eds., 1983) (stating that Holmes's dissent in *Abrams* adopts the view that "political truths are, by definition, those made so by the majority").

Although his ultimate conclusion is that Holmes did not believe in objective truth, Sunstein does recognize the ambiguity in Holmes's discussion of truth. See SUNSTEIN, *supra* note 8, at 25–26 (acknowledging the influence of Charles Peirce on Holmes's opinion); see also Greenawalt, *supra* note 56, at 153; Solum, *supra* note 220, at 68–72.

²⁵⁰ See Greenawalt, *supra* note 56, at 154 ("Unless an independent notion of truth is supposed, an argument that truth is what emerges from the marketplace of ideas does not yield distinctive support for a free speech principle."); see also SCHAUER, *supra* note 56, at 19–20; Solum, *supra* note 220, at 71.

second chapter of John Stuart Mill's *On Liberty*.²⁵¹ However, noting the fact that Holmes and Peirce came out of a common intellectual milieu and even belonged to the same philosophical discussion group in the 1870s,²⁵² scholars have identified Peirce's work as a more immediate and important source for the *Abrams* opinion.²⁵³ Indeed, Louis Menand has recently called Holmes's free speech opinions "the greatest single contribution to American life" made by Peirce's thought.²⁵⁴ Referring specifically to Holmes's language in *Abrams*, Menand remarks that "even the metaphors are Peircean."²⁵⁵ Peirce's epistemology can thus illuminate Holmes's use of the marketplace trope.

In discussions of the marketplace concept, it has been objected that there is little reason to believe that objective truth exists, or if it does, that people are capable of recognizing it.²⁵⁶ And even when the legal literature has considered

²⁵¹ JOHN STUART MILL, *ON LIBERTY* (1849), reprinted in *THE UTILITARIANS* 473, 490–530 (1973).

²⁵² The young Holmes was, along with Peirce, a member of a fortnightly "metaphysical club," which met in Cambridge in the 1870s. See Paul Weiss, *Biography of Charles S. Peirce*, 14 *DICTIONARY OF AMERICAN BIOGRAPHY* 398 (Dumas Malone ed., 1934), reprinted in *PERSPECTIVES ON PEIRCE*, *supra* note 98, at 1, 6.

²⁵³ Some have minimized or denied entirely Peirce's influence on Holmes. See, e.g., SHELDON NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 426–27 n.4 (1989); H.L. POHLMAN, *JUSTICE OLIVER WENDELL HOLMES & UTILITARIAN JURISPRUDENCE* 163–64 (1984). Nonetheless, the considered view of the most persuasive authorities has been that, despite some unreliable evidence on the other side of the question, Holmes's understanding of the relationship between speech and truth owed much to Peirce's way of thinking. See, e.g., Max H. Fisch, *Charles Sanders Peirce* (1939), reprinted in MAX FISCH, *PEIRCE, SEMIOTIC, AND PRAGMATISM: ESSAYS BY MAX FISCH* 17 n.27 (Kenneth L. Ketner & Christian J.W. Kloesel eds., 1986) (stating that "Holmes's general outlook was closer to Peirce's than to [William] James's, and many phrases, including his formulas for truth, read like echoes of Peirce's conversation") (emphasis added); Catharine W. Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 *NW. U. L. REV.* 541, 545–47 (1988) (reviewing the evidence on the matter and concluding that "the relevant tradition [for placing Holmes's philosophy] is the pragmatism of Peirce and [William] James"); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 *MICH. L. REV.* 827, 879 n.90 ("Parts of the *Abrams* dissent seem almost a paraphrase of Peirce's essay *The Fixation of Belief*. . . Holmes [and] Peirce . . . have much in common.").

²⁵⁴ Louis Menand, *An American Prodigy*, *N.Y. REV. OF BOOKS*, Dec. 2, 1993, at 30, 35 (reviewing JOSEPH BRENT, *CHARLES SANDERS PEIRCE: A LIFE* (1993)).

²⁵⁵ *Id.*

²⁵⁶ See Baker, *supra* note 35, at 974; Ingber, *supra* note 56, at 25–26. But see Greenawalt, *supra* note 56, at 132–34; Barry Holden, *Liberal Democracy and the Social Determination of Ideas*, 25 *[LIBERAL DEMOCRACY] NOMOS*, *supra* note 249, at 289, 294–97 (arguing that the notion that "ideas are socially determined and that they are relative—and

Peirce's views, it has often been asserted that Peirce himself believed that truth was nothing more than what a given community decided to believe.²⁵⁷ These assertions misstate, however, what is admittedly a difficult aspect of his thought. Peirce did suggest that we could understand truth as the conclusion reached by the community; but, this is the case only when the community is given its most expansive definition and only when the inquiry is posited as having continued for an infinite period of time:

The real, then, is that which, sooner or later, information and reasoning would finally result in, and which is therefore independent of the vagaries of me and you. Thus, the very origin of the conception of reality shows that this conception essentially involves the notion of a COMMUNITY, *without definite limits, and capable of an indefinite increase of knowledge.*²⁵⁸

The community does not "create" truth, but it is able, through the combined and infinitely ongoing efforts of the individuals within it, to discover truth. As Christopher Hookway has expressed it: "[I]f we were to inquire efficiently enough, and for long enough, then we are guaranteed, eventually, to arrive at the truth."²⁵⁹ While we, as individuals and a society existing in time, will obviously have to make decisions about how to live in the world and so will have to act on our beliefs, our beliefs must always remain open to revision.

Peirce's explanation of the acquisition of knowledge refutes rather than vindicates communitarian notions suggesting that "each group of language users, each cultural formation or discursive universe, constructs a 'reality' that is, in practical consequences, real enough."²⁶⁰ Although his thinking has often been co-opted in support of such beliefs, "Peirce would not have had the smallest degree of patience with such a theory. For him the community is

do not express truths" should be "rejected as incoherent"); William P. Marshall, A Reconstruction of the Search for Truth (January 1995) (unpublished manuscript, on file with the author) (proposing numerous bases for grounding First Amendment freedoms of speech and religion on the quest for transcendent truth).

This, it should be noted, is not the position of the equalitarians who assert, at the very least, the objective truth of the importance of social equality.

²⁵⁷ See, e.g., Solum, *supra* note 220, at 71. Even many of those who affirm Holmes's affinity with Peirce endorse some version of this idea. See, e.g., Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 789, 800 (1989); Hantzis, *supra* note 253, at 552, 555-57; Posner, *supra* note 253, at 879-80.

²⁵⁸ Peirce, *supra* note 1, at 52 (emphasis added).

²⁵⁹ HOOKWAY, *supra* note 74, at 73; see also MISAK, *supra* note 104, at 126-37; SKAGESTAD, *supra* note 102, at 25-26, 76-79.

²⁶⁰ Menand, *supra* note 254, at 34. Thomas Grey goes particularly far in this direction. See Grey, *supra* note 257, at 800.

always identical with the species, and the last analysis really is the last."²⁶¹ A full explanation of Peirce's notion of the truth is impossible here, and its complexity has only been hinted at. The important idea is that Peirce believed that the achievement of total knowledge of reality was a goal that could be approached asymptotically by a community of inquirers.²⁶² While perfect knowledge must always be regarded as a point lying on the horizon of a future time, the progress *toward* that point means an increase in knowledge.²⁶³ The ability of inquiry to propel us toward the point on the horizon demonstrates the value of inquiry; our inability actually to reach the point in a finite period of time mandates that the inquiry continue, never foreclosing the reconsideration of any belief, even those which we hold most strongly. Hence, Peirce's epistemology avoids the pitfalls of both skepticism and dogmatism.²⁶⁴ If total knowledge of the world has potential to become a reality—one that is achievable only over the long run—contingent decisions about what may and may not be discussed become essentially intolerable, hence Peirce's belief that the greatest intellectual mistake was to "block the way of inquiry."²⁶⁵

The connections between this account of Peirce's view of reality and Holmes's dissent in *Abrams* make clear what Menand meant in remarking that Holmes's metaphors were Peircean. Holmes, after all, did not say that the marketplace of ideas would discover "political truth." He said it was the best chance for discovering *truth*. It hardly sounds like what Sunstein calls "hard-headed skepticism" to believe that freedom of speech is "an experiment as all life is an experiment" in which "we have to wager our salvation upon some prophecy based upon imperfect knowledge." These are indeed the metaphors of Peirce's dedication to the scientific method of attaining knowledge and his faith that inquiry could lead the community to an end that no individual could expect

²⁶¹ Menand, *supra* note 254, at 34; *see also* MISAK, *supra* note 104, at 81. Much of the confusion over this matter has probably arisen due to the tendency to group Peirce, not only with other thinkers of his own time whose versions of pragmatism Peirce found objectionable, but also with modern pragmatists and neopragmatists who differ profoundly from him on this question. For a comprehensive account of Peirce's ultimate belief in objective truth and its superiority over the neopragmatists skepticism, *see* CARL R. HAUSMAN, CHARLES S. PEIRCE'S EVOLUTIONARY PHILOSOPHY 194-225 (1993).

²⁶² *See* HAUSMAN, *supra* note 261, at 217-21; SKAGESTAD, *supra* note 102, at 75-78.

²⁶³ *See* MISAK, *supra* note 104, at 79-85 (explaining Peirce's endorsement of the scientific method as the model for inquiry).

²⁶⁴ *See* SKAGESTAD, *supra* note 102, at 25-26; *see also* HOOKWAY, *supra* note 74, at 73.

²⁶⁵ 1 PEIRCE, *supra* note 75, ¶ 135.

to see. As Holmes also said, "[t]hat at any rate is the theory of our Constitution."²⁶⁶

Peirce's concept of truth thus provides democratic theory with a rationale that goes beyond a version of societal autonomy that endorses any decision, however ill advised, made by the majority. For if public discourse offers the means to the discovery of truth, then democracy is best seen as the exercise of a communal autonomy with the crucial difference that it is guided by a quest for an understanding of reality. Social equalitarians would thus have no basis upon which to propose suspending or modifying democratic principles to outlaw disfavored speech in the name of a particular substantive goal. To argue that a goal such as social equality trumps the democratic process, it would be necessary to argue either that supporters of such measures have knowledge to which the polity is not privy or that they possess powers of normative judgment that exceed those of the society at large. Neither of these arguments is available once we accept that democracy is best understood—and that the Constitution does in fact understand it—as a project of choosing our societal fate through the exercise of communal will based on our best chance of discovering truth.

As for the problem of the failure of the marketplace, this schema of its processes recognizes the possibility, even the inevitability, of all kinds of human error. But there is nothing distinctive about those errors supposedly attributable to "marketplace failure." Because we can never be certain enough of the truth of any proposition to foreclose the chance of learning something that might change our minds, none of the errors coming out of public discourse (even assuming we could identify them as such) are correctable by external fiat. Hence the necessity of the ongoing inquiry.²⁶⁷ The errors resulting from so-called market failure will take time to be corrected, as do all errors. The economic and social shortcomings of society may have effects that hamper the process of inquiry (although they will almost certainly also supply a powerful impetus to speech urging their own correction²⁶⁸). But because the accretion of knowledge is a continuing process, although it encounters obstacles and takes

²⁶⁶ *Abrams v. United States*, 250 U.S. 616, at 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

²⁶⁷ It is even misleading to speak of "market failures" in the marketplace of ideas. Since we do not have a theory of what a well-functioning first amendment "market" would look like, it gives false comfort to suggest that the problem is ascertainable "failures" that need only be eliminated in order to generate good outcomes.

David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 349 (1991).

²⁶⁸ See Redish & Lippman, *supra* note 203, at 277.

missteps along the way, allowing it to continue is the best chance for the correction of the errors.

Peirce's thought does more than validate the legitimacy of free speech as a mere instrument of democratic theory. The societal search for the good life depends upon the aggregation of that process as it is carried out by individuals. The communal search for knowledge requires the testing of disagreements among people and envisions the competition as healthy for individuals and the society alike.²⁶⁹ The process necessarily begins with the creation of the individual self through the triadic behavior of speech and entails the self's life-long realization through inquiry into the nature of reality. And while perfect understanding of reality is clearly beyond the reach of any individual,²⁷⁰ to be allowed to make one's way towards it means a more perfect realization.²⁷¹ The principle of individual self-realization thus harmonizes completely with the marketplace of ideas as a medium for the achievement of objective truth. Free speech is not dictated by the choice of democracy; instead, democracy is required once the full value and purpose of speech is understood. Realization of the individual selves within the community joins with the community's own realization as the free exchange of speech fuels both processes.

V. CONCLUSION

The persistence of racism and sexism in our nation more than a century after the adoption of the Civil War Amendments is an unhappy reality of American life. Despite the undeniable progress that has been made in the last thirty years, the intransigence of the problem has proved so frustrating that substantial numbers of people, both within and outside of the legal community, stand ready to visit radical changes upon firmly established principles of free speech and democracy. The failure of more conventional efforts to eradicate all of the manifestations of discrimination has led many to the conclusion that control over the expression of ideas contrary to social equality is the only remaining route to progress. Thus, they have cast their lot on the side of equality, trusting that any measure aiding the fight against oppression could not cost more than it will repay.

The passion for social equality is admirably motivated, but it must not be allowed to blind us to the dangers posed by its overzealous pursuit. To those who claim to prize the worth of the individual, no good can come from fighting prejudice by preventing people from speaking—or, only slightly more

²⁶⁹ See, e.g., Massey, *supra* note 8, at 165; Redish & Lippman, *supra* note 203, at 274-75.

²⁷⁰ See *supra* text at notes 109, 200.

²⁷¹ See *supra* notes 121-22 and accompanying text.

ominously, from thinking—thoughts deemed wrong or immoral. What is special about human beings is that they do think and that through speech they share their thoughts with others in the quest to fulfill their potential, both as individuals and as a community. The intellectual fallibility that is also a part of being human militates not for the expulsion of ideas adjudged evil by government, but rather for an understanding that ideas—and speech, the medium of ideas—occupy a realm importantly distinct from other aspects of life. And while actions induced by ideas are and must be subject to society's legal control, it is the capacity to conceive ideas at all and the freedom to indulge that capacity that endow humans with the characteristics that make society itself possible.

If speech about questions upon which the majority has already made a decision is considered worthless (and even criminal where speech decrying the majority's decision causes pain to some), then the freedom of speech could fall gradually into desuetude as society secures itself against dissent on issue after issue until the community has completely crystallized its legally speakable beliefs, locking itself onto a single course. Such a scenario is only the logical extreme implied by proposals to ban speech in opposition to social equality. This image of an ideologically static society is chilling because it embodies the antithesis of what democracy most fundamentally imagines human life to be about. The temptation to prevent others from falling into what we feel sure to be erroneous beliefs is powerful indeed, particularly when the very expression of those beliefs pains us by challenging our own sense of who we are. Forbidding our ideological enemies from exercising their most human powers may appear both to resolve clashes over values and to save ourselves the pain of conflict; in reality, however, doing so only diminishes us all. We cannot increase our humanity, however desperate our desire to do so, by chipping away at its foundation.

